TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 82

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE, PETITIONER,

vs.

OREGON STEVEDORING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 27, 1962
CERTIORARI GRANTED APRIL 16, 1962

876

No. 17616

United States
Court of Appeals
For the Ninth Circuit

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,

Appellant,

vs.

OREGON STEVEDORING COMPANY, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 1/22/62—Printed 2/13/62

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

WOOD, WOOD, TATUM, MOSSER & BROOKE;
ERSKINE B. WOOD,
1310 Yeon Building, Portland 4, Oregon,
For Appellant.

GRAY, FREDRICKSON & HEATH;
FLOYD A. FREDRICKSON,
1021 Equitable Building, Portland 4, Oregon,
For Appellee.

In the United States District Court
For the District of Oregon

No. Civ. 60-375

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,

Libelant,

vs.

OREGON STEVEDORING COMPANY, INC.,

Respondent.

LIBEL

To the Honorable Judges of the above-entitled Court in admiralty sitting:

The libelant, in a cause of contract, civil and maritime, brings this libel against the respondent and thereupon alleges as follows:

I.

Libelant is and at all times mentioned was a business concern organized and existing under the laws of Italy, and engaged in the business of operating ocean-going steamships. The libelant is, and at all times mentioned, was the owner and operator of the motor ship Antonio Pacinotti.

II.

Respondent is, and at all times mentioned was, an Oregon corporation engaged in the business of an independent contracting stevedore, and maintained an office in Portland, Oregon.

III.

At all times pertinent herein, there existed a contract between libelant and respondent, whereby respondent undertook to perform the stevedore work on libelant's vessel while in Columbia River ports. Pursuant to said stevedoring contract, the respondent, as master stevedore, conducted the stevedoring operations on the M. S. Antonio Pacinotti on or about November 19, 1958, while said vessel was in the port of Portland, Oregon, and in so doing employed one William Griffiths as a longshoreman. At said time and place respondent supplied a hatch tent, together with appurtenant tie down ropes for use by the longshoremen aboard the vessel.

IV.

On or about November 19, 1958, while respondent was conducting stevedoring operations aboard said vessel, said William Griffiths, in the course of his employment, pulled on one of the tie-down ropes on said hatch tent, which rope parted, resulting in said William Griffiths' falling to the deck of the vessel and resulting in personal injuries to him. Because of these, he brought an action at law against the libelant in the Circuit Court of the State of Oregon for the County of Multnomah bearing Clerk's number 261-553.

V.

Libelant gave formal notice to respondent to come in and defend said action and to assume re-

sponsibility therefor. A copy of said notice is attached hereto, marked Exhibit A, and by this reference made a part hereof. Respondent failed and refused to take any action whatsoever with respect thereto.

VI.

The aforesaid action proceeded to trial and the jury returned a verdict in favor of Griffiths, and a judgment was entered therein against libelant, for the sum of $5,891.03, together with costs and disbursements taxed at $62.49, and with interest on said judgment from the date thereof until paid. Libelant satisfied said judgment on the 12th day of September, 1960, by the payment of $5,953.52. Copies of said judgment and satisfaction of judgment, marked Exhibits B & C respectively, are attached hereto and by this reference made a part hereof.

VII.

The respondent breached its stevedoring contract with libelant to perform the work in a proper, safe and workmanlike manner, and supplied a tent rope which failed in the course of being used for the purpose for which it was supplied.

VIII.

As a result of said breach and negligent performance, said Griffiths was injured and libelant, by reason of the ensuing action at law and judgment and the necessary payment thereof has been damaged in the sum of $5,953.52 and in the further sum

of $1,250 attorneys' fees and $295.80 costs and expenses necessarily incurred in the defense of the aforesaid action. Respondent is liable to indemnify libelant in full for said loss and damage in the sum of $7,499.32.

IX.

All and singular, the premises are true and within the Admiralty and Maritime jurisdiction of the United States and this Honorable Court.

Wherefore, libelant prays that process may issue against the said respondent and that it be cited to appear and answer the allegations of this libel and that the libelant may be decreed to have and recover from and against respondent the aforesaid damages in the total sum of $7,499.32, with interest thereon at the legal rate from and after September 12, 1960, and for such other and further relief as to the Court may seem just and in accordance with the Admiralty practice.

WOOD, MATTHIESSEN,
WOOD & TATUM,

/s/ JOHN C. HOLDEN,
Proctors for Libelant.

EXHIBIT A

March 2, 1960

Certified Mail

William Griffith v. Soc. per Azioni di Nav. Italia, Genoa, No. 261-553 in The Circuit Court of the State of Oregon for the County of Multnomah.

Oregon Stevedoring Company,
3630 N. W. Front,
Portland, Oregon.

Gentlemen:

We refer to the above matter. We represent Italia Societa Per Azione Di Navigazione (Italian Line), owner of the M/V Antonio Pacinotti. On or about 19 November 1958, one of the longshoremen in your employ, Mr. William Griffith, was injured aboard the M/V Antonio Pacinotti while the vessel was moored at Terminal 1, Portland, Oregon.

Mr. Griffith alleges he sustained injuries when he was heaving on a hatch tent rope which parted, causing him to fall to the deck.

At the time and place of this accident Oregon Stevedoring Company was under contract with the vessel's owner to perform the stevedoring work aboard the vessel. Oregon Stevedoring Company owned the tent rope in question and controlled the longshore activities aboard ship.

William Griffith filed a complaint in the Multnomah County Circuit Court. It has been superseded

by an amended complaint, a copy of which is enclosed.

From our investigation of this accident, it appears that Oregon Stevedoring Company is responsible for William Griffith's injuries. Therefore, on behalf of the M/V Antonio Pacinotti and her owners, we hereby tender the defense of said action to you and give you notice to so defend. We further notify you that if the vessel Antonio Pacinotti and/or her owner are held liable to William Griffith in said action Italian Line will hold you liable and seek full indemnity from you for any and all losses, damages and expenses incurred by the vessel and her owner in said action and for any judgment suffered by it and for all costs and expenses incurred in investigating, preparing and defending said action, including reasonable attorney's fees.

Your failure to answer this letter within ten days of receipt thereof will be deemed a rejection of this notice and tender.

Very truly yours,

WOOD, MATTHIESSEN,
WOOD & TATUM,

By JOHN G. HOLDEN.

JGM:cma

Encl.

EXHIBIT B

For the County of Multnomah

No. 261-553

WILLIAM GRIFFITHS,

Plaintiff,

vs.

SOC. per AZIONI di NAV. ITALIA, GENOA, a Corporation, Company or Concern,

Defendant.

JUDGMENT ORDER

The above-entitled cause having come on regularly for trial by jury before the Honorable Judge William J. Crawford, Judge pro-tem, of the above-entitled Court, plaintiff appearing in person and Donald R. Wilson, of counsel and the defendant appearing by John Holden of counsel, for trial June 29, 1960, the jury having been selected, empaneled and sworn, opening statements having been made by counsel, evidence having been received on behalf of the respective partis, arguments having been addressed to the jury by counsel, the Court having instructed the jury upon the law, and the jury thereupon having retired for deliberation, did deliberate and return its verdict on July 1, 1960, in words and figures as follows, omitting the title of the Court and cause, to wit:

"We, the Jury, being duly empaneled and sworn to well and truly try the above-entitled

cause, do find our verdict in favor of the plaintiff, William Griffiths, and against the defendant, Soc. per Azioni di Nav. Italia, Genoa, a corporation, company or concern, and assess plaintiff's special damages in the sum of $891.03 and general damages in the sum of $5,000.00.

Dated this 1st day of July, 1960.

/s/ JAMES SCHMITT,
Foreman."

and said verdict having been received and entered and accepted by the Court and the Court being fully advised in the premises now, therefore, based upon said verdict.

It Is Hereby Ordered and Adjudged that plaintiff, William Griffiths, have of and recover from the said defendant, Soc. per Azioni di Nav. Italia, Genoa, a corporation, company or concern, the sum of Five Thousand Eight Hundred Ninety-One Dollars and Three Cents ($5,891.03) in lawful money of the United States of America, together with his costs and disbursements taxed and allowed herein in the sum of $62.49, the aggregate of which is to bear interest at the rate of six per cent (6%) per annum from the date of entry hereto until paid, and that execution issue therefore.

Dated this 8th day of July, 1960.

/s/ WILLIAM J. CRAWFORD,
Judge.

EXHIBIT C

In the Circuit Court of the State of Oregon
For the County of Multnomah

No. 261-553

WILLIAM GRIFFITH,

Plaintiff,

vs.

SOC. per AZIONI di NAV. ITALIA, GENOA, a Corporation, Company or Concern,

Defendant.

SATISFACTION OF JUDGMENT

For and in consideration of the sum of Five Thousand Nine Hundred Fifty-Three and 52/100 Dollars ($5,953.52), lawful money of the United States paid to me by the above-named defendant, receipt of which is hereby acknowledged, full satisfaction is hereby acknowledged of that certain judgment rendered in the said Multnomah County Circuit Court in the action, on the 2nd day of July, 1960, in favor of William Griffith, plaintiff, and against Soc. per Azioni di Nav. Italia, Genoa, in case number 261-553, for the sum of Five Thousand Eight Hundred Ninety-one and 03/100 Dollars ($5,891.03), together with costs and disbursements taxed at Sixty-two and 49/100 Dollars ($62.49), and with interest on said judgment at six per cent (6%)

per annum from the date of said judgment until paid. I hereby authorize the Clerk of said Court to enter satisfaction of record of said judgment in the said action.

Dated this 12th day of Sept., 1960.

/s/ WILLIAM GRIFFITH.

Approved:

/s/ DONALD R. WILSON,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah—ss.

On this 12th day of Sept., 1960, before me, a Notary Public for said County and State, personally appeared William Griffith, to me personally known to be the individual described in and who executed the foregoing satisfaction of judgment, and acknowledged to me that he executed the same freely and voluntarily, for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and seal the day and year last above written.

[Seal] /s/ MARY E. HENDRICKSON,
Notary Public for Oregon.

My commission expires 12/17/63.

[Endorsed]: Filed October 4, 1960.

Duly verified.

[Endorsed]: Filed October 10, 1960.

[Title of District Court and Cause.]

ANSWER OF RESPONDENT

To the Honorable Judges of the above-entitled Court in admiralty sitting:

Comes now the respondent for answer to the libel in personam herein admits, denies and alleges as follows:

I.

Admits the allegations of Articles I, II, III, V, VI of the said libel, but the respondent has no knowledge or information sufficient to form a belief as to the remaining articles and allegations of the said Libel and, therefore, denies the same and the whole thereof.

Wherefore, respondent prays that the Libel herein be dismissed.

GRAY, FREDRICKSON & HEATH,

By /s/ FLOYD A. FREDRICKSON,
Of Proctors for Respondent.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed November 7, 1960.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This matter came on regularly for a pre-trial conference before the above-entitled Court and the undersigned Judge thereof, libelant appearing by Wood, Wood, Tatum, Mosser & Brooke, its attorneys, and respondent appearing by Gray, Fredrickson & Heath, its attorneys, and the following pretrial order was made.

Nature of the Case

This is a cause of action for indemnity based on contract for damages allegedly sustained by libelant as a result of the alleged negligent performance of a stevedoring contract by respondent.

Procedural Matters

This cause was commenced by the filing of a libel in admiralty in the United States District Court for the District of Oregon; respondent has answered said libel.

Agreed Facts

Libelant and respondent agree upon the following facts and no proof thereof shall be necessary upon the trial of this case.

I.

Libelant is a business concern organized and existing under the laws of Italy, and engaged in the business of operating ocean-going steamships, and

is the owner and operator of the Motor Ship Antonio Pacinotti; respondent is an Oregon corporation engaged in the business of an independent contracting stevedore. This Court has jurisdiction of the subject matter of this cause and the parties hereto upon the admiralty side of the Court.

II.

At all times pertinent herein there existed a contract between libelant and respondent whereby respondent undertook to perform the stevedoring work on libelant's vessels while the same were in Columbia River ports. Pursuant to said stevedoring contract, respondent, as a master stevedore, conducted the stevedoring operations on the MS Antonio Pacinotti on or about November 19, 1958, while said vessel was in the port of Portland, Oregon. In so doing, respondent employed one William Griffiths as a longshoreman for work aboard said vessel. At said time and place respondent supplied a hatch tent, together with appurtenant tie down ropes for use by the longshoremen in the stevedoring operations aboard the vessel.

III.

On or about November 19, 1958, while respondent was conducting stevedoring operations aboard said vessel, said William Griffiths, in the course of his employment, pulled on one of the said tie down ropes on said hatch tent, which rope parted, resulting in William Griffiths falling to the deck of the vessel and resulting in personal injuries to him.

IV.

As a result of said fall and resulting injuries, William Griffiths brought an action at law against the libelant in the Circuit Court of the State of Oregon for the County of Multnomah, bearing Clerk's number 261-553.

V.

Libelant gave formal notice to respondent to come in and defend said action and assume responsibility therefor. Said notice read as follows:

"Oregon Stevedoring Company
3630 N. W. Front
Portland, Oregon

Gentlemen:

We refer to the above matter. We represent Italia Societa Per Azione Di Navigazione (Italian Line), owner of the M/V Antonio Pacinotti. On or about 19 November 1958, one of the longshoremen in your employ, Mr. William Griffith, was injured aboard the M/V Antonio Pacinotti while the vessel was moored at Terminal 1, Portland, Oregon.

Mr. Griffith alleges he sustained injuries when he was heaving on a hatch tent rope which parted, causing him to fall to the deck.

At the time and place of this accident Oregon Stevedoring Company was under contract with the vessel's owner to perform the stevedoring work aboard the vessel. Oregon Stevedoring Company

owned the tent rope in question and controlled the longshore activities aboard ship.

William Griffith filed a complaint in the Multnomah County Circuit Court. It has been superseded by an amended complaint, a copy of which is enclosed.

From our investigation of this accident, it appears that Oregon Stevedoring Company is responsible for William Griffith's injuries. Therefore, on behalf of the M/V Antonio Pacinotti and her owners, we hereby tender the defense of said action to you and give you notice to so defend. We further notify you that if the vessel Antonio Pacinotti and/or her owner are held liable to William Griffith in said action Italian Line will hold you liable and seek full indemnity from you for any and all losses, damages and expenses incurred by the vessel and her owner in said action and for any judgment suffered by it and for all costs and expenses incurred in investigating, preparing and defending said action, including reasonable attorney's fees.

Your failure to answer this letter within ten days of receipt thereof will be deemed a rejection of this notice and tender.

Respondent failed and refused to take any action whatsoever with respect to said notice.

VI.

The said action proceeded to trial and the jury returned a verdict in favor of William Griffith and

against the libelant, and a judgment was entered thereon against libelant for the sum of $5,891.03, together with costs and disbursements taxed at $62.49, with interest on said judgment from the date thereof until paid. Libelant satisfied said judgment on the 12th day of September, 1960, by the payment of $5,953.52.

Libelant's Contentions

Libelant contends and the respondent denies the following:

1. Respondent breached its stevedoring contract with libelant to perform the stevedoring work aboard said vessel in a safe, proper and workmanlike manner in one or more of the following particulars:

a. In negligently providing a hatch tent with appurtenant tie down ropes, one of which said ropes was weak, defective and rotten;

b. In negligently failing to inspect said tie down rope before supplying it for use aboard said vessel.

c. In negligently failing to test said tie down rope before supplying it for use aboard said vessel.

d. In supplying a tent tie down rope which failed in the course of being used for the purpose and in the manner for which it was supplied.

2. As a proximate and foreseeable result of said breach of contract, said William Griffith was in-

jured, and libelant, by reason of the ensuing action at law and judgment therein and the necessary payment thereof, has been damaged in the sum of $5,953.52, and in the further sum of $1,250.00 attorney's fees and $295.80 costs and expenses necessarily incurred by libelant in the defense of said action.

3. Respondent is liable to indemnify libelant in full for said loss and damage in the sum of $7,499.32.

Respondent's Contentions as Against Libelant

The respondent contends and the libelant denies as follows:

Issues

The issues of this case are raised by the contentions of the parties and denials thereof.

Physical Exhibits

Certain physical exhibits have been identified and received as pre-trial exhibits, the parties agreeing, with approval of the Court, that no further identification of these exhibits is necessary. In the event that the exhibits, or any of them, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only upon the grounds of relevancy, competency and materiality.

Libelant's Exhibits

1. Reserved. Amended Complaint.

2. Reserved. Excerpts of Proceedings.
3. Reserved. Judgment Order.
4. Reserved. Cost Bill.
5. Reserved. Satisfaction of Judgment.
6-A. Bill from Wood's office.
6-B. Bill from Wood's office.
7. Answers to Interrogs.
8. Responses to Request for Admissions.
9. Old Rope.
10. New Rope.

Respondent's Exhibits

21. Contract between Libelant and Respondent.

Expert Testimony

Each of the parties hereto reserves the right to call experts as witnesses to give opinion evidence on matters upon which experts can give their opinions on the issues made up by the contentions of the parties and denials thereof.

The foregoing constitutes a pre-trial order in the above matter and supersedes the pleadings herein and may be amended hereafter upon consent of the parties or in furtherance of justice or to conform with the proof.

Dated this 9th day of March, 1961.

/s/ GUS J. SOLOMON,
United States District Judge.

Approved:

/s/ JOHN G. HOLDEN,
Of Attorneys for Libelant.

/s/ LLOYD W. WEISENSEE,
Of Attorneys for Respondent.

Lodged January 17, 1961.

[Endorsed]: Filed March 9, 1961.

[Title of District Court and Cause.]

OPINION
April 21, 1961

Solomon, Judge:

Libelant, owner of the vessel SS Antonio Pacinotti, brought this action against the respondent Oregon Stevedoring Company, to recover the amount which it was required to pay in satisfaction of a judgment recovered against it by William Griffith, an employee of the respondent.

Griffith, a longshoreman, was injured aboard the SS Antonio Pacinotti when a 3/4" rope upon which he was pulling broke and threw him to the deck. The rope was permanently attached to a tent supplied by respondent. Griffith's case was submitted to the jury in the state court on both negligence and unseaworthiness, and a general verdict was rendered against the libelant.

Prior to the accident, the libelant and respondent had entered into a stevedoring contract which provided: "Stevedoring Company will be responsible * * * for injury to or death of any person caused by its negligence * * *"

In this action, libelant seeks indemnification from the respondent for the amount of the judgment plus costs, on two theories: (1) the respondent was guilty of negligence; and (2) respondent breached its implied warranty of workmanlike service.

Libelant's contention that the state court judgment is conclusive as to the issue of respondent's negligence is without merit. Since the verdict was a general one, no one can tell whether the jury found in favor of Griffith on the issue of negligence or on unseaworthiness or on both. Security Insurance Co. of New Haven v. Johnson, 10 Cir. 1960, 276 F. 2d 182. It is regrettable that the trial court failed to submit a special verdict to the jury. Such a verdict would have established the basis of the jury's action.

I have serious doubts as to whether the doctrine of res ipsa loquitur is applicable in this case. However, even if applicable, I think the respondent has overcome any presumption or inference of negligence.

I likewise find that the libelant is not entitled to recover on its alternative theory of implied warranty. Here, the contract between the parties expressly limited the respondent's liability to its negli-

gence. It is a clear and unambiguous provision, and in my opinion negatives an implied warranty of workmanlike service.

The libel is dismissed.

[Endorsed]: Filed April 21, 1951.

[Title of District Court and Cause.]

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly for hearing on the libelant's objections to the respondent's Proposed Findings of Fact and Conclusions of Law and the libelant's Proposed Findings of Fact, the libelant being represented by Erskine B. Wood and John G. Holden and the respondent being represented by Floyd Fredrickson. This is a libel in personam and the cause came on for trial before the Court sitting in admiralty and the Court considered the evidence and rendered an opinion on April 21, 1961, and being fully advised does hereby revoke and set aside the Findings of Fact and Conclusions of Law previously signed and entered herein and does hereby make and enter its Findings of Fact and Conclusions of Law in pursuance of Admiralty Rule 46½ as follows:

(1) Libelant is now and at all times material was a business concern organized and existing under the laws of Italy and is the owner and operator of the Motor Ship Antonio Pacinotti.

(2) Respondent is now and at all material times

was an Oregon corporation engaged in the business of an independent contracting stevedore.

(3) Prior to the accident hereinafter described, libelant and respondent had entered into a stevedoring contract (respondent's exhibit 21), whereby respondent undertook to perform the stevedoring work on libelant's vessels while the same were in Columbia River ports. This contract provided in part:

"II.

It is understood and mutually agreed by the parties hereto:

A. That the Stevedoring Company will furnish all necessary labor and supervision and all ordinary gear for the performance of the services described in this contract, including winch drivers and usual appliances used for stevedoring; and

B. That the Steamship Company will furnish suitable booms, winches, blocks, and falls, steam and/or power and lights and will maintain the same in safe and efficient working conditions during the progress of the work.

* * *

VIII.

The Stevedoring Company will be responsible for damage to the ship and its equipment, and for damage to cargo or loss of cargo overside, and for injury to or death of any person caused by its negligence, provided, however, when such damage occurs to the ship or its equipment, or where such damage or loss occurs to cargo, the ship's officers

or other authorized representatives call the same to the attention of the Stevedoring Company at the time of occurrence. The Steamship Company shall be responsible for injury to or death of any person or for any damage to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment."

(4) This stevedoring contract was prepared and drawn up by respondent and presented in a printed form.

(5) Pursuant to the stevedoring contract between libelant and respondent, respondent conducted the stevedoring operations on the MS Antonio Pacinotti on November 19, 1958, while said vessel was lying in the Willamette River in the Port of Portland, Oregon. The Willamette River is a navigable water of the United States and the stevedoring contract is a maritime contract.

(6) William Griffith, a longshoreman employed by respondent, was injured aboard the MS Antonio Pacinotti on November 19, 1958, when a ¾-inch rope upon which he was pulling broke and threw him to the deck. The rope was permanently attached to a Seattle hatch tent supplied by respondent.

(7) William Griffith brought an action at law against the libelant in the Circuit Court of the State of Oregon for the County of Multnomah. At the trial of that action two issues of liability were presented by the Court's instructions, to wit:

(a) Was the vessel unseaworthy in that the rope was rotten and defective and unsafe to heave on, and

(b) Was the shipowner negligent in failing to supply or furnish a tent line of proper strength.

A general verdict was returned against the libelant. Libelant satisfied the resultant judgment on September 12, 1960, by payment of $5,953.52 (libelant's exhibit 5).

(8) Prior to the trial of the case brought by William Griffiths against the libelant, the libelant tendered the defense of said case to respondent, which tender was rejected by respondent.

(9) In addition to the amount paid by libelant to satisfy said judgment, libelant incurred reasonable attorneys' fees and necessary costs and expenses in the defense of said State Court action in the sum of $1,545.80.

(10) The Seattle hatch tent tie-down rope in question was permanently spliced to an eye in the tent. At the time of the accident Griffith and his work partner had passed the rope through a deck fixture and back up and through the splice by which the rope was permanently attached to the tent.

(11) Griffith was pulling on the free end of the rope when it broke. The rope broke between the point where it ran through the splice.

(12) At the point where the rope ran through the splice, the rope ran across other rope and not across any metal.

(13) It is not usual for a rope of this type to break when one man is pulling on it. Three, four or five men can usually pull on a rope of this type without its breaking.

(14). The rope in question was made of Manila and its size and type had a rated breaking strength of 5,400 pounds.

(15) At the moment the rope broke it was defective and unfit for the purpose for which it was intended.

(16) The Seattle hatch tent and tent tie-down rope involved herein were owned, supplied, rigged and exclusively controlled by respondent at all times material. Said tent rope was the respondent's gear and equipment.

(17) At the time that the rope broke the rope was being used for the purpose and in the manner for which it was supplied by respondent for use by respondent's employees.

(18) The securing of the tent and the manner in which the tent and tent rope were being secured were entirely and exclusively within the supervision and control of respondent.

(19) The injuries to Griffith were the natural and foreseeable consequences of the breaking of the rope.

(20) There is no evidence, outside of the written contract itself, as to the intent of the parties with respect to construction or interpretation of the

stevedoring contract, or with respect to implied obligations under said contract.

(21) The tent line when supplied by respondent to libelant was a proper type of rope for use as a tent rope and there was no evidence that it was in an unsatisfactory condition.

(22) Respondent used reasonable care to provide libelant with a proper tent tie down rope and has overcome any inference of negligence which might be inferred on behalf of libelant.

Conclusions of Law

(1) This cause is within the admiralty and maritime jurisdiction of the United States and of the above-entitled Court.

(2) The judgment rendered in the State Court action against the libelant is not conclusive as to the issue of respondent's negligence.

(3) The respondent was not negligent.

(4) The contract between libelant and respondent limits respondent's liability to its negligence.

(5) The libelant is not entitled to recover from respondent, and its libel should be dismissed and respondent is entitled to recover its costs herein.

Dated and entered this 20th day of June, 1961.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed June 20, 1961.

In the United States District Court
For the District of Oregon

Civil No. 60-375

ITALIA SOCIETA' PER AZIONI DI NAVIGAZIONE,

Libelant,

vs.

OREGON STEVEDORING COMPANY, INC.,

Respondent.

DECREE

This Matter having come on regularly for hearing before the undersigned Judge of the above-entitled Court, libelant appearing through John G. Holden, of its proctors, and respondent appearing through Floyd A. Fredrickson, of its proctors, and the Court having heard the evidence and considered the Memoranda submitted by counsel and now being fully advised in the premises and having rendered a written Opinion on file herein and having made and filed its Findings of Fact and Conclusions of Law, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. The libel is dismissed with costs taxed in favor of the respondent and against the libelant at $32.72.

Dated this 20th day of June, 1961.

/s/ GUS J. SOLOMON,
United States District Judge.

Presented by:
/s/ FLOYD A. FREDRICKSON,
Of Proctors for Respondent.

[Endorsed]: Filed June 20, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Oregon Stevedoring Company, Inc., and Gray, Fredrickson & Heath, Floyd A. Fredrickson, its proctors:

Notice is hereby given that libelant Italia Societa Per Azioni Di Navigazione, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final decree entered herein on June 20, 1961, which decree dismissed the libel and denied libelant's claim against respondent.

Dated this 15th day of September, 1961.

WOOD, WOOD, TATUM,
MOSSER & BROOKE,

/s/ ERSKINE B. WOOD,
Proctors for Libelant.

Service of copy acknowledged.

[Endorsed]: Filed September 15, 1961.

[Title of District Court and Cause.]

APPELLANT'S POINTS ON APPEAL AND ASSIGNMENTS OF ERROR

Libelant-appellant relies upon the following points on appeal and assignments of error:

Points on Appeal

I.

Respondent as contracting stevedore owed to libelant an implied warranty to render workmanlike service and to furnish and maintain in good condition, fit for the purpose intended, the equipment owned and supplied by, and at all times in the exclusive possession and control of respondent.

II.

Respondent breached this warranty in that a hatch tent tie-down rope, owned and supplied by, and at all times in the exclusive control and possession of, respondent, was defective and unfit for the purpose intended, as a result of which it broke while being used by respondent causing the accident, and causing damages to libelant.

III.

The written stevedoring contract between libelant and respondent does not relieve respondent from liability for this breach of warranty.

Assignments of Error

1. The Trial Court erred in failing to conclude as a matter of law that respondent owed to libelant

an implied warranty to render workmanlike service and maintain in good condition the equipment owned and supplied by, and at all times in the exclusive possession and control of, respondent.

2. The Trial Court erred in its conclusion of law (Conclusion No. 4) that the contract between libelant and respondent limits respondent's liability to its negligence.

3. The Trial Court erred in its conclusion of law (Conclusion No. 5) that libelant was not entitled to recover from respondent, and that the libel should be dismissed.

4. The Trial Court erred in failing to conclude that libelant was entitled to recover from respondent.

5. The Court erred in entering a decree in favor of respondent dismissing the libel, and in failing to enter a decree in favor of libelant and against respondent for the amount of libelant's damages with interest and costs.

Dated this 25th day of September, 1961.

WOOD, WOOD, TATUM,
MOSSER & BROOKE,

By /s/ ERSKINE B. WOOD,
Proctors for Libelant-
Appellant.

Service of copy acknowledged.

[Endorsed]: Filed September 28, 1961.

EXHIBIT No. 21

Cable Address: "Oreste"

Oregon Stevedoring Company
3630 N. W. Front Avenue
Portland 10, Oregon

Stevedoring Contract

Memorandum of Agreement

Made this 16th day of June, 1958.

Between Oregon Stevedoring Company (hereinafter called the Stevedoring Company, First Party, and The Italian Line (hereinafter called the Steamship Company, Second Party,

I.

It is mutually agreed between the parties hereto, that the Stevedoring Company will act as stevedores, and that they will with all possible dispatch, load and/or discharge all cargoes of vessels owned, chartered, controlled, or managed by the Steamship Company at all Columbia and Willamette River ports as directed. And it is agreed that the Steamship Company will grant to the said Stevedoring Company the exclusive rights of handling all such cargoes as before mentioned under the terms of this agreement, and will pay for the work done by the Stevedoring Company in lawful money of the United States at the rates set forth in Schedule "A," attached hereto and made part thereof.

II.

It is understood and mutually agreed by the parties hereto:

A. That the Stevedoring Company will furnish all necessary labor and supervision and all ordinary gear for the performance of the services described in this contract, including winch drivers and usual appliances used for stevedoring; and

B. That the Steamship Company will furnish suitable booms, winches, blocks, and falls, steam and/or power and lights and will maintain the same in safe and efficient working conditions during the progress of the work.

III.

It is understood and agreed that, in the execution of the work under this contract, the provisions of any labor agreement existing between the longshoremen and/or other labor groups and the waterfront employers governing (or in the absence of such labor agreement, any regulations or current practices of the port applicable to) longshore work performed in the ports in the Columbia River District shall be observed.

IV.

A. All stevedoring rates specified are based on, and subject to, the employment of present longshore and related labor at the wage scales and under the working conditions existing in the port as of the date of the execution of this contract, under respective labor agreements between the longshoremen and/or other labor groups and the waterfront em-

ployers. In the event of an increase or decrease in such wage scales or a change in such working conditions, the rates specified herein shall, as a consequence, be proportionately increased or decreased, as of the effective date of such change retroactively, currently or prospectively, as the case may be.

B. The rates and charges provided for in this contract are, and the rates and charges provided for in all previous contracts between the Stevedoring Company and the Steamship Company were, predicated upon the assumption that the present practices of the port, in respect to the determination of straight and overtime rates of pay for labor, are and were in compliance with the provisions of the Fair Labor Standards Act. In the event it shall hereafter be determined that the provisions of the Fair Labor Standards Act require the payment of compensation in excess of that required by applicable and prevailing labor agreements and the practice of the port, then the Stevedoring Company shall be reimbursed by the Steamship Company for any additional overtime or other payments for which the Stevedoring Company may be liable under the terms of the Fair Labor Standards Act in respect to work performed under this contract or such previous contracts.

V.

The Steamship Company agrees that the officers of its vessels are to give every assistance at their command to facilitate the work of loading and discharging its vessels.

~~VI.~~

~~It is agreed that night work is to be avoided as far as possible, owing to the recognized inefficiency of labor in performing night services.~~

VII.

The Stevedoring Company shall carry:

A. Workmen's Compensation insurance for the protection of its employees under State and Federal Laws;

B. Public Liability insurance in the amount of $250,000.00 as respects bodily injury or death of one person, and in the amount of $500,000.00 as respects bodily injury to, or death of, more than one person, on account of any one accident, as protection against injury to or death of any person or persons arising out of negligence of the Stevedoring Company under this agreement.

C. Property damage insurance in the amount of $1,000,000.00 as protection against loss or injury to property arising out of negligence of the Stevedoring Company under this agreement.

VIII.

The Stevedoring Company will be responsible for damage to the ship and its equipment, and for damage to cargo or loss of cargo overside, and for injury to or death of any person caused by its negligence, provided, however, when such damage occurs to the ship or its equipment, or where such damage or loss occurs to cargo, the ship's officers or other

authorized representatives call the same to the attention of the Stevedoring Company at the time of occurrence. The Steamship Company shall be responsible for injury to or death of any person or for any damage to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment.

IX.

In the event of strikes, lockouts, union disputes, or other labor disturbances, the Stevedoring Company will be under no obligation to undertake performance of this contract. No liability shall attach to the Stevedoring Company if the terms of this agreement cannot be performed due to acts of God, riots, civil or labor disturbances, war, restrains of governments, fire, explosion, or other acts beyond its control.

~~X.~~

~~The Stevedoring Company shall collect and retain any customary charges for labor services in connection with the direct loading and unloading of railroad cars, lighters, barges, scows.~~

XI.

This agreement is subject to the following conditions regarding the delivery and acceptance of cargo:

A. All cargo to be discharged is to be delivered on wharf or onto open lighters alongside of ship at end of ship's tackle unless otherwise specified with

respect to any specific commodities enumerated in Schedule "A." All cargo to be loaded is to be taken delivery of from wharf or open lighter or cars alongside of ship within reach of ship's tackle, unless otherwise specified with respect to specific commodities enumerated in Schedule "A," or in case of grain or cereals, at the mouth of conveyor or chute on wharf (where such is used).

~~D. When the Stevedore handles cargo to and/or~~ from Place of Rest on the dock, the Stevedoring Company shall sort the cargo on the dock as discharged, according to the Bill of Lading lot or lots and mark or marks; truck the cargo a reasonable distance to and from the ship's tackle; pile the cargo on the dock and break down piles as high as one man can handle. Any extra sorting, piling, breaking down of piles, repiling, will be charged for ~~at payroll, plus ——— %.~~

XII.

This agreement is subject to the following provisions with respect to charges for overtime, ship's time, handling of damaged cargo, and other extras:

A. When the Stevedoring Company is required to work at locations where travel time is required to be paid the men, in accordance with the wage scale, such travel time will be charged for at payroll cost. When vessels are working in the stream or other places where means of transportation for the men are required, or hotel or meal allowance

must be paid in accordance with the labor agreement, any expense so incurred will be charged for at cost. The expense of transportation of gear and equipment to and from the stream, will be charged for at cost.

B. Rates set forth in Schedule "A" are to be charged on all cargo handled on the basis of 2000 lbs. weight, or 40 cu. ft. to the ton and/or as specified.

C. Said rates are for work performed during the ordinary straight time working hours on regular working days, as set forth in current Labor Agreements.

D. Said rates for the handling of cargo in regular holds only. For loading and discharging deep tanks, cross bunkers, poop, peak or in similar compartments where cargo has to be handled in excess of 30 feet from hatchway, there will be charged, in addition to said rates, 35 cents per ton, weight or measurement, on all cargo except lumber and ties for which the extra charge will be 65 per M.F.B.M. For unloading stowed ties from cars at ship's tackle, there will be an additional charge of 50 cents per M.F.B.M. This additional charge also to apply when loading in staggered holds.

E. For work performed during overtime and/or penalty hours, or on Saturday, Sundays, legal holidays, or during meal hours, as set forth in current Labor Agreement, the Stevedoring Company, in addition to the rates specified herein, shall be reim-

bursed the amount of its extra payroll ~~cost plus ....%~~. The extra wages paid for such overtime and penalty time will be as set forth in the current labor agreements governing longshore and related labor.

F. All work performed on board, around or in connection with vessels of the Steamship Company, such as shifting coal, shifting or restowing cargo, rigging and unrigging gear, loading or discharging mails, baggage, ship's stores, debris, or dunnage, shifting and laying dunnage, carpenter or coopering work, cleaning holds, handling ship's lines and gangways, and any other ship's work required other than the actual discharging or loading of cargo, shall be charged as "Ship's Time" and shall be paid for at payroll cost plus .....%.

G. When handling cargo damaged by fire, water, oil, etc., and where such damage causes distress or obnoxious conditions, or in all cases where the men are called upon to handle cargo under distress conditions, the Stevedoring Company charges are to be based upon the payroll cost, in accordance with the labor agreements, plus .....% for overhead, and profit, in lieu of the rates specified herein together with the cost of gear destroyed, and the cost of equipment for the protection of the men as may be required. If the condition of the cargo or packages or vessel or pier is other than in customary good order, thereby delaying prompt handling, special arrangements shall be agreed upon in lieu of the rates herein specified.

H. Whenever work is interrupted after starting and detention of less than fifteen minutes delay occur, the Stevedoring Company will make no charge for reimbursement thereof. For detention time of fifteen minutes or more, the Stevedoring Company will charge full detention time at labor cost. When men are employed and unable to work through causes beyond the Stevedoring Company's control, or when men are to be paid for a minimum working period in accordance with the labor agreement, the cost of such waiting or idle time will be charged for by the Stevedoring Company at payroll cost plus ....%.

I. For loading or discharging lifts of 8000 lbs. or over, see provisions under "Heavy Lifts" in Schedule "A."

XIII.

The term "payroll cost" as used herein shall in addition to wages include workmen's compensation, public liability and property damage insurance, social security and unemployment taxes, and longshoremens pension, vacation, health and welfare and mechanization assessments when applicable.

XIV.

This Agreement shall be in force and effect until terminated by either party giving thirty days' written notice to the other. The rates named in Schedule "A" shall, at the request of either party, be subject to review and adjustment after 60 days from date hereof, and periodically thereafter.

In Witness Whereof the parties hereto have duly executed this agreement in duplicate the day and year first above written.

OREGON STEVEDORING COMPANY,

By.....
President.

THE ITALIAN LINE,
By GENERAL SS CORPORATION, LTD.,
As Agents.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Keith Burns, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Libel; Answer of Respondent; Pre-Trial Order; Opinion of Judge Gus J. Solomon; Findings of Fact and Conclusions of Law; Decree; Notice of Appeal by Libelant; Appellant's Points on Appeal and Assignments of Error; Designation of Record on Appeal; Motion and Order to Forward Exhibit 21 to Court of Appeals, and Transcript of Docket Entries constitute the record on appeal from a decree of said court in a cause therein numbered Civil 60-375 in which Italia Societa Per Azioni Di Navi-

gazione is the libelant and appellant and Oregon Stevedoring Company, Inc., is the respondent and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith Respondent's exhibit No. 21, and

I further certify that the cost of filing the notice of appeal, $5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 21st day of October, 1961.

[Seal] KEITH BURNS,
Clerk,

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 17616. United States Court of Appeals for the Ninth Circuit. Italia Societa Per Azioni Di Navigazione, Appellant, vs. Oregon Stevedoring Company, Inc., Appellee. Transcript of the Record. Appeal from the United States District Court for the District of Oregon.

Filed October 26, 1961.

Docketed November 10, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[fol. 42]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Barnes, Hamlin & Jertberg, Circuit Judges.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—August 1, 1962

This cause coming on regularly for hearing or submission, Mr. Erskine B. Wood, argued for the appellants and Mr. Floyd A. Fredrickson, argued for the appellee and thereupon the Court ordered the cause submitted for consideration and decision.

[fol. 43]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Barnes, Hamlin & Jertberg, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—October 25, 1962

Ordered that the typewritten opinion and dissenting opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment be filed and recorded in the minutes of this Court in accordance with the majority opinion rendered.

[fol. 44] IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,616

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE, Appellant,

vs.

OREGON STEVEDORING COMPANY, INC., Appellee.

Appeal from the United States District Court for the District of Oregon.

OPINION—October 25, 1962

Before: Barnes, Hamlin and Jertberg, Circuit Judges.

HAMLIN, Circuit Judge:

Appellant, Italia Societa Per Azioni di Navigazione, a shipowner, contracted with the Oregon Stevedoring Company, Inc., appellee herein, for the performance of stevedoring services on appellant's ship, the M.S. Antonio Pacinotti. On or about November 19, 1958, during the course of stevedoring operations a longshoreman named Griffith, an employee of the stevedoring company, was injured due to a latently defective rope which had been brought onto the ship by the stevedoring company. Griffith recovered a judgment against appellant shipowner which it satisfied. Thereafter, in a separate action appellant shipowner brought suit against appellee stevedoring company claiming indemnity from appellee for the amount of the judgment which it had been required to pay Griffith. Appellant based its claim for indemnity on the ground that the stevedoring company had been negligent and had breached its warranty of workmanlike service in supplying the defective rope. The stevedoring contract contained an express warranty whereby the stevedoring company undertook to indemnify the shipowner for negligence in the perform-
[fol. 45] ance of its services.[1] The district court found that

[1] The express indemnity clause read:

The Stevedoring Company will be responsible for damage to the ship and its equipment, and for damage to cargo or loss of cargo

the stevedoring company had not been negligent in any way in bringing onto the ship the rope which caused injury to the longshoreman. The district court held that the presence of the express warranty covering negligence precluded any recovery for breach of an implied warranty of workmanlike service, in essence relying on the maxim *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another). Judgment was entered for the stevedoring company and the shipowner appealed to this court which has jurisdiction pursuant to 28 U.S.C.A. § 1291.

No complaint is made on this appeal of the district court's finding that the stevedoring company was not negligent. Appellant contends merely that an implied warranty of workmanlike service arose from the contractual relationship between the parties which implied warranty placed a duty upon the stevedoring company to supply proper and seaworthy equipment. It is contended that a failure to supply seaworthy equipment is a breach of the implied warranty of workmanlike service which entitles the shipowner to indemnity for any liability it incurs resulting from the faulty equipment regardless of whether the stevedoring company was negligent in supplying the equipment. Assuming that there is an implied warranty which covers the facts of this case, the appellant shipowner argues that the mere presence of the express clause indemnifying for negligence does not preclude a recovery on the implied warranty. It will be unnecessary to consider the last contention if we determine that the warranty of workmanlike service does not include elements of liability without fault, [fol. 46] i.e., that the stevedoring company absent negli-

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overside, and for injury or death of any person caused by its negligence, provided, however, when such damage occurs to the ship or its equipment, or where such damage or loss occurs to cargo, the ship's officers or other authorized representatives call the same to the attention of the Stevedoring Company at the time of occurrence. The Steamship Company shall be responsible for injury to or death of any person or for damage to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment.

gence on its part does not warrant the suitability of the equipment which it supplies pursuant to its stevedoring contract.

We address ourselves, then, to the question whether a stevedoring company breaches its implied warranty of workmanlike service, which breach results in indemnity to the shipowner, when it supplies unseaworthy equipment to a ship on which it is to perform stevedoring services even though the stevedoring company has not been negligent in any way.

The leading case on indemnity liability for breach of the implied warranty of workmanlike service is *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). In that case a stevedoring company had agreed to perform stevedoring services and one of its employees was injured during the unloading. A jury returned a verdict for the longshoreman against the shipowner. The shipowner had impleaded the stevedoring company claiming that it was entitled to full indemnity because the stevedoring company had negligently failed to stow the cargo in a safe and proper manner which negligence caused the shipowner to be liable to the longshoreman. The informal stevedoring contract made no reference to an express indemnity agreement. After rejecting the contention of the stevedoring company that indemnity was precluded by the provision in the Longshoremen's and Harbor Worker's Compensation Act which made a longshoreman's recovery of compensation his exclusive remedy against his employer,[2] the Court held that the shipowner was entitled to indemnity based on the stevedoring company's breach of its implied warranty of workmanlike service.

Prior to Ryan the Court had recognized that a stevedoring company could by contract expressly agree to indemnify the shipowner for any liability to longshoremen occasioned by the fault of the stevedoring company, *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446 (1947). Where the contract did not deal expressly with indemnity such liability arose from the stevedoring company's obligation to perform

[2] Longshoremen's and Harbor Worker's Compensation Act § 5, 33 U.S.C.A. § 905.

[fol. 47] its services in a workmanlike manner. The contractual obligation was described as a "warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product." The warranty "is of the essence of . . . [the] stevedoring contract."[3] In *Ryan* the obligation was to stow the cargo "properly and safely" and a breach of the obligation was a breach of the warranty of workmanlike service giving rise to a right in the shipowner of indemnity against the stevedoring company for money which the shipowner became liable to pay to a longshoreman on account of the breach.

Much judicial effort since *Ryan* has been concerned with defining the nature and scope of a stevedoring company's implied warranty of workmanlike service. But only one case, *Booth S.S. Co.* v. *Meier & Oelhaf Co.*, 262 F.2d 310 (2d Cir. 1958), has decided that the warranty of workmanlike service includes elements of liability without fault. In the *Booth* case a contractor who undertook to repair a ship brought some unseaworthy equipment on board which caused injury to a workman and as a result the shipowner was liable for unseaworthiness. Indemnity was sought from the contractor, but the district court dismissed the third-party claim of the shipowner since there had been no proof that the contractor had been negligent in supplying the equipment. On appeal the parties agreed that neither of them had been negligent, and the court stated that the question was whether the contractor could be liable for indemnity where it had supplied defective equipment without fault. Recognizing that the question had not been decided before, the court, nevertheless, did not believe that the leading cases on indemnity excluded "the existence of liability without fault as an element of the warranty of workmanlike service in appropriate cases."[4] After its discussion the court stated:

> [We] hold that if the contractor undertook to do the work of repair of the vessel's engines, and if he sup-

[3] 350 U.S. at 133-134.

[4] 262 F.2d at 313. The court did not intimate what it meant by "appropriate cases".

plied the equipment which failed in the course of the use for which it was supplied, then the failure constituted a breach of the contractor's warranty of workmanlike service and rendered him liable to indemnify [fol. 48] the owner for damages paid to the contractor's employee on account of injuries resulting directly from the failure.[5]

Appellant shipowner in the instant case urges us to follow the Second Circuit's *Booth* decision and therefore hold the stevedoring company liable for indemnity for bringing onto the ship a defective rope even though the stevedoring company was not negligent in any way. Appellee stevedoring company argues that some negligence of the stevedoring company is required to constitute a breach of its implied warranty of workmanlike service. Appellee would also have us distinguish *Booth* from the instant case on the ground that *Booth* involved a repairman whereas this case involves a stevedoring company. We consider *Booth* to be indistinguishable from this case on the ground urged or any other. In the context of this case a repairman cannot be distinguished from a stevedoring company. Any distinction in kind is without legal significance. However, we find ourselves in disagreement with the result reached in *Booth* that non-negligent action can give rise to indemnity liability.[6] Thus, we refuse to follow the Second Circuit on the point here involved.

It is our belief that the term "warranty of *workmanlike* service" is not properly susceptible to an interpretation

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[5] 262 F.2d at 314-315.

[6] The Court in *Booth* felt that it was not unreasonable to require the supplier of equipment to test and inspect the materials "the omission of which would not constitute negligence." (262 F.2d at 314.) However, what the court was articulating was a basis for strict liability without fault and it would seem that discussion of a burden to make tests the omission of which would not be negligence is inappropriate for the reason that standards of conduct and of performance are irrelevant where strict liability is imposed. Strict liability doesn't depend on what one does or does not do according to any set standard of care. The court's discussion would seem, rather, to be no more than an attempt to state a justification for risk-shifting from one party to another.

which makes an act done free of negligence and totally without fault the basis of a breach of the warranty. We think the word "workmanlike" means a "proper", "safe" and "non-negligent" manner of doing something. "Workmanlike" has been defined as "skillful" or "well done" and is said to be synonymous with "deft", "proficient" or [fol. 49] "adept",[7] all words which connotate a standard of skill similar to that associated with the reasonable man test for negligence. Cases discussing the legal meaning of "workmanlike" are replete with words and phrases of similar import.[8]

We have scrutinized the leading Supreme Court cases in the field and have found in the Court's discussion terms the repeated use of which support a conclusion that "workmanlike" describes an ordinary standard of care in the performance of a service the breach of which standard is equivalent to negligence. Thus, in the *Ryan* case, *supra*, the Court stated that the stevedoring company's contractual obligation is to stow the cargo "with reasonable safety," "properly and safely" and "in a reasonably safe manner"; the liability of the stevedoring company arises from "improper" stowage and the "failure to stow . . . 'in a reasonably safe manner' "; "competency and safety of stowage are inescapable elements of the service undertaken"; the recovery of the shipowner on his contract may turn upon the "standard of the performance" of the stevedoring service; and the duty of the stevedoring company is to hold the shipowner harmless from "foreseeable damages."

In *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563 (1958), the Court held that it was error to take a case from the jury on the question of indemnity where there was evidence tending to establish negligence on the part of the stevedoring company even though the shipowner had been held liable to the longshoreman only on the basis of negligence and not for unseaworthiness of

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[7] Webster's New International Dictionary 2952 (2d ed. unabridged) ("workmanlike").

[8] See cases cited in 18A *Words & Phrases* 22 ("Good and Workmanlike Job") and 45 *Words & Phrases* 520 ("Workmanlike manner") (permanent ed.).

the vessel.[9] In *Weyerhaeuser* much language from *Ryan* (which is set out above) was utilized, and the Court mentioned that the contractual obligation is to perform duties "with reasonable safety"; the stevedoring company is liable if in using ship's gear it renders a "sub-standard performance."

[fol. 50] Statements similar to those in *Ryan* and *Weyerhaeuser* appear in the three later cases where the Supreme Court has had occasion to discuss the *Ryan* case and liability for indemnity, Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962); Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960); Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959).

We are not unmindful that negligence liability and warranty liability are not identical. Negligence is a liability in tort while warranty is generally associated with contract liability.[10] Nevertheless, as indicated by the Supreme

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[9] The court recognized that at some point activity on the part of the shipowner would preclude its recovery of indemnity from the stevedoring company even though the stevedoring company might also be negligent in some respect. 355 U.S. at 567-568.

[10] In recent history liability for breach of warranty has been associated with contract more than anything else. See Harper & James, *Torts* § 28.16 (1956) and Prosser, *Torts* § 84 (2d ed. 1955). But there is support for the proposition that warranty was originally a tort liability. Prosser, *Torts* 507 (2d ed. 1955). Increasingly, warranty is becoming a liability apart from tort perhaps because much of it does not necessarily depend on fault or the adherence to a standard of care; and warranty is drifting away from contract probably because many who are entitled to a recovery in warranty have no contractual relationship with the person from whom they seek to recover. Concepts of privity of contract are ever more gradually giving way to sweeping coverage of warranty. See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960). While the precise nature of warranty may in general be disputable, it is clear that the warranty of workmanlike service of a stevedoring company arises from contract. Of late, however, the importance of a contract between stevedoring company and shipowner (or ship in the case of a libel *in rem*) has been undermined; its presence is no longer a necessary condition to an indemnity based upon an implied warranty of workmanlike service. Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960); Crumady v. The

Court in *Ryan* the recovery of the shipowner in warranty still may turn upon a standard of performance of the stevedoring service. We believe that in the stevedoring cases the standard of performance is the same whether the ultimate liability be in tort (for negligence) or in contract (for breach of warranty).

[fol. 51] Our belief is not altered by the mere fact that there can be no liability of the stevedoring company in tort. In these indemnity cases there is no liability in tort, not because the standard would be different from that of warranty, but rather, because prior to *Ryan* the Supreme Court had decided that there could be no contribution, based on comparative fault, between shipowner and stevedoring company in respect of seamen's injuries on the ground that there had been no contribution in the common law between joint tort feasors. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952).[11] The entire liability in tort (including liability for unseaworthiness) would rest upon the shipowner since a longshoreman's right to workmen's compensation under the Longshoremen's and Harbor Workers' Compensation Act is his exclusive remedy against the wrongdoing of his employer, the stevedoring company.[12] This latter legislative reality when juxtaposed on the rule of the *Halcyon* case, *supra*,

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Joachim Hendrik Fisser, 358 U.S. 423 (1959). In *Waterman* and *Crumady* the shipowner was allowed to recover for breach of warranty even though there was no direct contract relationship between him and the stevedoring company. However, the contract idea was adhered to since the ship or shipowner were considered to be the third-party beneficiaries of the contract between the stevedoring company and the one who contracted for its services.

[11] In *Halcyon* a shipowner was sued by a longshoreman and the shipowner impleaded the employer stevedoring company. A jury determined that the shipowner had been 25% responsible for the longshoreman's injuries and that the stevedoring company had been 75% responsible. The district court equally divided the damages analogizing to collision cases. The Supreme Court held that there could be no contribution which lead to the result that shipowner who was only 25% responsible was liable for the whole while the 75% responsible stevedoring company was not liable at all.

[12] See note 2 *supra*.

precluded any possibility of liability of the stevedoring company in tort. If the shipowner was to be relieved at all from the onerous burden of *Halcyon*, liability against the stevedoring company for its wrongs would necessarily have to be predicated upon contract and not tort.[13] This background to *Ryan* cannot be separated from an analysis of the liability of the stevedoring company for breach of the implied warranty of workmanlike service. And when this background is kept in mind it seems reasonable to posit that the warranty of workmanlike service was intended only to impose liability in contract similar to that which would otherwise have been imposed in tort (for being negligent in the performance of stevedoring services)—not that the one (warranty) is the substitute for the other (tort) but that the standard of performance in each case is the same.

[fol. 52] The efforts of the shipowner in this case to hold the stevedoring company for action done without fault is an attempt to impose upon the stevedoring company the same degree of liability for unseaworthiness as that which is imposed upon the shipowner. We see no reason in policy or otherwise why the stevedoring company should be liable for unseaworthiness insofar as that doctrine encompasses liability without fault.[14] Liability of the shipowner for unseaworthiness arises where the ship's gear is not reasonably fit for the purpose for which it is intended. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960). The liability extends to longshoremen and other workmen who are injured while performing duties traditionally done by members of the ship's crew. Seas Shipping Co. v. Sieracki, 328

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[13] See Gilmore & Black, *Admiralty* 366-374 (1957).

[14] Whether a particular set of facts gives rise to an action for negligence alone, for unseaworthiness alone or for both negligence and unseaworthiness is often an extremely difficult question. It has become quite evident that there is a very minute area, if any, which is negligence but not at the same time unseaworthiness. The continued existence of such an area is largely theoretical. The unseaworthy whale has all but swallowed the negligent Jonah. See generally Gilmore & Black, *Admiralty* § 6—34 - 6—44 (1957) and Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L.Q. 381 (1954).

U.S. 85 (1946); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). And liability is imposed upon the shipowner even where the equipment which causes injury to a longshoreman is brought onto the ship by his employer, the stevedoring company. Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954). Just as the longshoreman is entitled to the warranty of seaworthiness while performing duties traditionally done by the ship's crew, the liability imposed with respect to equipment brought on board by the stevedoring company or other contractor would seem to rest upon the similar proposition that the gear was traditionally that which belonged to the ship. But the liability for unseaworthiness is the shipowner's not the stevedoring company's. The liability is absolute and non-delegable. Mitchell v. Trawler Racer, Inc., *supra;* Seas Shipping Co. v. Sieracki, *supra;* Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

The Supreme Court has recognized that the respective duties of the stevedoring company and the shipowner to the longshoreman rest upon different principles than do [fol. 53] their liabilities with respect to each other.[15] In view of this factor there would seem to be no necessary reason why a shipowner could not be liable without the stevedoring company always being liable at the same time to the shipowner. The shipowner is liable to the longshoreman for negligence and unseaworthiness and the stevedoring company is liable to the longshoreman for workmen's compensation, but this is not to say that as between the two the stevedoring company is liable to the same extent and upon the same basis as the shipowner. The stevedoring company's liability arises only from its contractual arrangement with the shipowner.[16] We believe the stevedoring company's warranty of workmanlike service is only breached (giving rise to indemnity) where it has rendered a sub-

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[15] See Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 568 (1958) and Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 134 (1956).

[16] *But see* note 10 *supra* in connection with *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421 (1960) and *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423 (1959).

standard, negligent performance. Such negligence on the part of the stevedoring company can of course give rise to unseaworthiness liability of the shipowner and in that situation there would be indemnity.[17] But we believe indemnity liability cannot arise from non-negligent actions done entirely without fault. The liability of the shipowner to the longshoreman for unseaworthiness arises from a policy to protect the longshoreman at the expense of the shipowner who presumably is better able to shoulder the risk of loss. No doubt this policy in part received impetus from the historical dogma that seamen are the wards of the admiralty court. But the stevedoring company is not liable for unseaworthiness, and we can see no policy comparable to that which gives rise to the shipowner's liability which would compel an indemnity in favor of the shipowner where the stevedoring company has not been negligent.

We do not believe the Supreme Court's characterization of the warranty of workmanlike service as being "comparable to a manufacturer's warranty of the soundness of its manufactured product"[18] precludes the result reached in this case. It must be recognized that the warranty of workmanlike service is in some sense different from the [fol. 54] manufacturer's warranty in that the former involves the performance of a service—unloading of vessels —while the latter attaches to a product that is made. Moreover, although some warranties result in strict liability of the manufacturer, certainly not all of them do.[19] We think a fair interpretation of all the langauge used in the leading cases (and the results reached in the plethora of other cases) is that the stevedoring companies are not liable for breach of the warranty of workmanlike service in the absence of some negligence.

We realize that stevedoring companies and shipowners enjoy considerable freedom of contract with respect to liability for indemnity, and we have no doubt that agreements

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[17] *E.g.*, Crumady v. The Joachim Hendrik Fisser, *supra* note 16.

[18] Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 133-34 (1956).

[19] See generally Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960).

could be made to cover expressly the action which we have said does not come within the implied warranty of workmanlike service. American Stevedores, Inc. v. Porello, 330 U.S. 446 (1947).

In view of our decision that the warranty of workmanlike service could not have been breached without some negligence on the part of the stevedoring company (i.e., that there was no implied warranty covering liability without fault), we find it unnecessary to decide whether the district court was correct in holding that the presence of the express contract clause indemnifying for negligence precluded any implied warranty.

Judgment affirmed.

JERTBERG: Circuit Judge (dissenting)

I respectfully dissent. I do so only because of my view that the opinion of my brethren reaches a wrong result in an important and unsettled area of Admiralty law and one which will have far-reaching consequences.

The majority members of the panel conclude that the warranty of workmanlike service could not have been breached without some negligence on the part of the Stevedoring Company and found it unnecessary to decide whether the district court was correct in holding that the express contract clause indemnifying for negligence precluded any implied warranty.

Since I believe that the district court's dismissal of appellee's libel should be set aside and the cause remanded [fol. 55] to the district court with instructions to enter judgment in its favor against appellee for the amount of the indemnity sought, it becomes necessary for me to first consider the issue not passed upon in the majority opinion.

The Seattle hatch tent and tent tie-down rope involved were owned, supplied, rigged and exclusively controlled by appellee. The rope in question was permanently spliced to an eye in the tent. At the time of the accident, Griffith and his work partner had passed the rope through a deck fixture and back up and through the splice by which the rope was permanently attached to the tent. Griffith was pulling on the free end of the rope when it broke. It broke between

the point where Griffith was holding it and the point where it ran through the splice. The securing of the tent and the manner in which the tent and tent rope were being secured were entirely and exclusively within the supervision and control of appellee. When the rope broke it was being used for the purpose and in the manner for which it was supplied by appellee for use by its employees. The rope was a proper type of rope for use as a tent rope and there was no evidence that it was in an unsatisfactory condition. When the rope broke it was defective and unsatisfactory for the purpose for which it was intended.

The provisions of the stevedoring contract existing between appellant and appellee which are relevant and pertinent on this appeal provide:

> "(a) That the Stevedoring Company will act as stevedores, and that they will with all possible dispatch, load and/or discharge all cargoes of vessels owned, chartered, controlled, or managed by the Steamship Company at all Columbia and Willamette River ports as directed. And it is agreed that the Steamship Company will grant to the said Stevedoring Company the exclusive rights of handling all such cargoes as before mentioned under the terms of this agreement, and will pay for the work done by the Stevedoring Company in lawful money of the United States at the rates set forth in Schedule 'A,' attached hereto and made a part hereof;
>
> "(b) That the Stevedoring Company will furnish all necessary labor and supervision and all ordinary gear for the performance of the services described in this [fol. 56] contract, including winch drivers and usual appliances used for stevedoring;
>
> "(c) That the Steamship Company will furnish suitable booms, winches, blocks, and falls, steam and/or power and lights and will maintain the same in safe and efficient working conditions during the progress of the work; and
>
> "(d) That the Stevedoring Company will be responsible for damage to the ship and its equipment, and for

damage to cargo or loss of cargo overside, and for injury to or death of any person caused by its negligence * * *. The Steamship Company shall be responsible for injury to or death of any person or for any damage to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment."

I shall first consider appellee's contention that appellant's right to indemnity must be determined from the provisions of the written stevedoring contract. Appellee argues that since the contract provides that appellee shall be responsible "for injury to or death of any person caused by its negligence" and since the district court found that appellee was not negligent in furnishing the defective rope, the decree of the district court dismissing appellant's libel must be affirmed.

The district court found that "there is no evidence, outside of the written contract itself, as to the intent of the parties with respect to construction or interpretation of the stevedoring contract, or with respect to implied obligations under said contract." Thus, there is presented as a question of law whether under the contract the liability of appellee is limited to negligence and thereby negatives the existence of any obligation on the part of appellee to perform the stevedoring services in a workmanlike manner.

Was appellee under an obligation to render workmanlike service to appellant under the terms of the contract? It is to be noted that appellee agreed to act as stevedore and to load and discharge all cargoes of vessels owned, controlled, or managed by appellee at Columbia and Willamette River ports as directed. It is also to be noted that the contract does not contain an express agreement of indemnity [fol. 57] unless the last quoted provision of the contract, properly construed, limits the liability of appellee to its negligence and bars indemnity.

Since the decision of the Supreme Court in *Ryan Stevedoring Co. Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), absent an express agreement of indemnity, it has been settled law that an agreement between a ship-

owner and a stevedore to perform loading and discharging of cargo includes the implied-in-fact obligation to render workmanlike service. In *Ryan*, a stevedoring company agreed to perform stevedoring services for the shipowner. The agreement was evidenced by letters, but without a formal stevedoring contract or an express indemnity agreement. One of the members of the stevedoring company was injured during the unloading. A jury returned a verdict for the longshoreman against the shipowner. The shipowner had impleaded the stevedoring company claiming that it was entitled to full indemnity because the stevedoring company had negligently failed to stow the cargo in a safe and proper manner which negligence caused the shipowner to be liable to the longshoreman. The Court held that the shipowner was entitled to indemnity based on the stevedoring company's breach of its implied warranty of workmanlike service. In the course of its opinion, the Court stated, at p. 133:

> "The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken."

In *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563 (1958), the Supreme Court held that it was error to take a case from the jury on the question of indemnity where there was evidence tending to establish negligence on the part of the stevedoring company even though the shipowner had been held liable to the longshoreman only on the basis of negligence and not for unseaworthiness of the vessel. The stevedoring contract contained no express indemnity clause. The Supreme Court held that the stevedoring company's implied-in-fact contractual obligation to perform its duties with reasonable safety embraced not [fol. 58] only the handling of cargo but the use by the steve-

dore of ship's gear. In the course of its opinion, the Court stated, at p. 567:

> "We believe that respondent's [stevedoring company] contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo, as in *Ryan*, but also to the use of equipment incidental thereto, such as the winch shelter involved here."

The implied-in-fact obligation of the stevedore to render service in a workmanlike manner is not based upon tort. As stated by the Supreme Court in *Ryan, supra*, at p. 133:

> "This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service."

In *Crumady* v. *The J. H. Fisser*, 358 U.S. 423 (1959), the Supreme Court stated, at pp. 428-429:

> "A majority of the Court ruled in *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124, that where a shipowner and stevedoring company entered into a service agreement, the former was entitled to indemnification for all damages it sustained as a result of the stevedoring company's breach of its warranty of workmanlike service. And see *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563. The facts here are different from those in the *Ryan* case, in that this vessel had been chartered by its owners to Ovido Compania Naviera S. A. Panama, which company entered into the service agree-

ment with this stevedoring company. The contract, however, mentioned the name of the vessel on which the work was to be done and contained an agreement on the part of the stevedoring company 'to faithfully furnish such stevedoring services.'

"We think this case is governed by the principle announced in the *Ryan* case. The warranty which a steve- [fol. 59] dore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, § 133. Moreover, as we said in the *Ryan* case, 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U.S., at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Id.*, at 133-134. See *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050."

See also *Waterman Co.* v. *Dugan & McNamara*, 364 U.S. 421 (1960), wherein it was held that a stevedoring company was liable to the shipowner for indemnity even though there was no privity of contract between them and regardless of whether the injured longshoreman asserted his claim in an *in rem* or an *in personam* proceeding, since the stevedore's warranty of workmanlike service aboard the ship was for the benefit of the ship and its owner as well as the stevedore.

I am of the view that the provision of the stevedoring contract under which appellee agrees to be responsible "for injury to or death of any person caused by its negligence," which statement is simply an affirmation of an existing duty on the part of appellee, does not exclude from the stevedoring contract the implied-in-fact obligation to perform stevedoring services in a workmanlike manner, nor do I find any other provision of the contract or the contract as a whole to have any such effect. The obligation of the stevedore to indemnify the shipowner rests not

upon negligence but upon contract. The contract does not limit such obligation.

The final question is whether the implied-in-fact contractual obligation of appellee to render its services in a workmanlike manner embraces within its scope the duty to see that the equipment or gear required to be and furnished for the use of its own employees in the performance of its stevedoring services and exclusively used and controlled by them, must be seaworthy and fit for the use intended. Under the contract, appellee agreed to furnish [fol. 60] not only all necessary labor and supervision but also "all ordinary gear for the performance of the services described in this contract, including winch drivers and usual appliances used for stevedoring." There is no contention in the record that the Seattle hatch tent and tent tie-down rope were not ordinary gear which appellee was obligated to furnish under the terms of the contract.

I have found no Supreme Court decision which has occasion to pass upon the duty of a stevedoring company vis-a-vis the shipowner in respect to gear or equipment required to be and furnished by it in the performance of stevedoring services. I recognize that liability has been imposed upon a shipowner for breach of the implied warranty of seaworthiness in favor of a longshoreman whose injuries were caused aboard ship by defective gear or equipment belonging to and brought on the ship by his employer the stevedoring company. *Alaska Steamship Co., Inc.* v. *Petterson*, 347 U.S. 396 (1954). The right of the shipowner to recover indemnity from the stevedoring company was not involved in that case. I have found no intimation in the many decisions of the Supreme Court which I have reviewed that a shipowner would be denied the right to indemnity against the stevedoring company in instances where liability has been imposed on the shipowner either for damages to person or property caused solely by defective equipment furnished by the stevedoring company and exclusively used, controlled, and supervised by it. To impose liability on the shipowner in favor of a longshoreman and to deny recovery over against the stevedoring company under such circumstances, is inequitable. Since the loss must be borne by either one or the other, it is not

unfair that such loss be ultimately borne by the one best able to eliminate the hazard, to wit: the owner of the defective gear or equipment who supplied it and whose use and control over it was exclusive.

In my view, the Supreme Court decisions above cited do not exclude the existence of liability without fault as an element of the warranty of workmanlike service under the facts of this case.

In *Ryan, supra*, it is stated, at pp. 133-134:

> "It is petitioner's [stevedore's] warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product."

[fol. 61] This statement was reaffirmed by the Supreme Court in *Waterman, supra*, and in *Crumady, supra*.

The only case passing upon this point to which attention has been directed is *Booth Steamship Co.* v. *Meier & Oelhaf Co.*, 262 F.2d 310 (2nd Cir. 1958). The majority opinion states that *Booth* is indistinguishable in any significant way from the instant case but disagrees with the result reached in the *Booth* case. In *Booth*, a contractor undertook to overhaul the engines on Booth's vessel. One of the first steps in the execution of the work was the extraction of tight fitting cylinder liners from the engine block, and this was undertaken by means of extracting equipment consisting essentially of a rigid bar, or strongback, which was attached to the liner, and a jack, which was used to raise the liner by raising the strongback. Because the lifting arm of the jack was relatively short, it was necessary periodically to suspend the strongback holding the liner from a wire strap while the jack itself was lifted up. It was while the strongback was so suspended that the strap parted, allowing the strongback to fall and sever the thumb of the plaintiff, who was engaged in elevating the jack itself for further lifting.

The shipowner was held liable to the injured workman of the contractor for unseaworthiness. The shipowner sought indemnity from the contractor, but the district court dismissed the third-party claim of the shipowner

since there had been no proof that the contractor had been negligent in failing to discover the defect in the strap, which defect was latent and not discoverable on visual inspection.

In the course of its opinion, the court stated, at pp. 314-315:

> "The implied warranty of suitability for a particular use made by manufacturers and retailers is generally considered absolute, however, and is not avoided by the fact that in the exercise of ordinary care the defendant could not discover the injury-causing defect. See 1 Williston on Sales § 237 (Rev.Ed.1948 and Supp. 1958). It has repeatedly been suggested that the liabilities of suppliers should be co-extensive with those of the law of sales. See 4 Williston on Contracts § 1041 (1936 Ed.); 2 Harper and James, The Law of Torts, § 28.19 (1956); Prosser on Torts 496 (2d Ed.1955). In Shamrock Towing Co. v. Fitcher Steel Corp., 2 Cir., [fol. 62] 1946, 155 F.2d 69 we stated in dictum that the warranty of a supplier of marine equipment was as absolute as the maritime warranty of seaworthiness, see The H. A. Scandrett, 2 Cir., 1937, 87 F.2d 708; that it therefore made no difference whether a defect was discoverable; that as a result both warranties would be breached in the event that the chattel supplied proved inadequate to the purpose for which it was supplied under normal conditions of use. We see no reason to alter that opinion.
>
> "Like the manufacturer or retailer the supplier profits from the bailment or lease of his equipment. Although he is unable to prevent defects arising in the course of manufacture, his expert knowledge of the characteristics of the equipment in use should enable him to detect them more readily than the user. It is therefore not less reasonable as an incident of his contract to charge him with the duty of making tests, the omission of which would not constitute negligence, than it is to charge the manufacturer or retailer with a similar responsibility. We think that this is particularly true when the chattel is supplied, as it pre-

sumably was here, in the partial fulfillment of a general undertaking to make repairs. In such circumstances the hirer defers to the special qualifications of the contractor in both the selection and use of the equipment. Relying on the supplier's control of the work and with confidence in the supplier's expert knowledge and competence, he makes at most only a routine inspection of the equipment employed. To say that the supplier warrants the equipment merely confirms the customary reliance which flows from such a relationship and which affords an appropriate remedy.

"Applying general principles to the facts of this case, we find that the defect which caused the plaintiff's injury was not detectable by the ordinary visual inspection which the vessel's officers on the scene may be expected to make. Such latent defects in wire as are undetectable on visual inspection may result from improper manufacture or from fatigue resulting from use over a period of time. They may perhaps be discovered by subjecting the equipment to appropriate tests with safety factors in excess of the contemplated undertaking. Furthermore, it is the supplier and not [fol. 63] the shipowner who knows the actual history of prior use of the equipment. He alone is in the position to establish such retirement schedules or periodic retests as will best prevent the development of visually undetectable flaws.

"Accordingly we hold that if the contractor undertook to do the work of repair of the vessel's engines, and if he supplied the equipment which failed in the course of the use for which it was supplied, then the failure constituted a breach of the contractor's implied warranty of workmanlike service and rendered him liable to indemnify the owner for damages paid to the contractor's employee on account of injuries resulting directly from the failure."

I find no significant fact which distinguishes the *Booth* case from the instant case. Much that is said in *Booth* can be applied with equal force to this case. I see no policy considerations in Maritime law and no injustice in

requiring a stevedore to indemnify a shipowner from a liability visited upon the shipowner solely through failure on the part of the stevedore to furnish, in connection with the performance of a stevedoring contract, equipment that is fit for the use intended.

It is to be noted that the case presented to us is that of the shipowner vis-a-vis the stevedoring company. We are not concerned with the injured longshoreman who has received compensation for his injuries, nor policy considerations which have led to a tender solicitude on the part of the Admiralty Court for injured seamen and longshoremen. The contest here is between equals and no thought should be given to which of them is more able to bear the burden.

I would set aside the decree of the district court dismissing appellee's libel and would remand the cause to the district court with instructions to enter judgment in its favor against appellee for the amount of the indemnity sought.

[File endorsement omitted]

[fol. 64]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,616

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE, Appellant,

vs.

OREGON STEVEDORING COMPANY, INC., Appellee.

JUDGMENT—Filed and Entered October 25, 1962

Appeal from the United States District Court for the District of Oregon.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered and adjudged by this court that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

[fol. 65]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Barnes, Hamlin and Jertberg, Circuit Judges.

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING—December 5, 1962

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed November 23, 1962, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

Judge Jertberg dissenting, would grant the petition for rehearing.

[fol. 66] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 67]

SUPREME COURT OF THE UNITED STATES

No. 876—October Term, 1962

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE, Petitioner,

vs.

OREGON STEVEDORING COMPANY, INC.

ORDER ALLOWING CERTIORARI—April 15, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 82

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,

Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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February 25, 1963.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 2-63

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OCTOBER TERM, 1962

No.....

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,

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v.

OREGON STEVEDORING COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on October 25, 1962, as to which rehearing was denied December 5, 1962.

OPINIONS OF COURTS BELOW

The opinion of the United States District Court for the District of Oregon is not reported. It is set forth at pages 21-23 of the printed Transcript of Record.

The opinion of the Court of Appeals, contained in the Transcript of Record, pp. 44-54, is printed in the Appendix hereto, *infra*, pp. 11-25, and is reported in 310 F. 2d 481-488; and the dissenting opinion, Transcript pp. 54-63, is printed in the Appendix, *infra* pp. 25-37, and reported in 310 F. 2d 488-493.

JURISDICTION

The judgment of the Court of Appeals was entered October 25, 1962 (Tr. 64) (Appendix p. 38). A timely petition for rehearing was filed November 23, 1962, and was denied, with dissent, December 5, 1962 (Tr. 65). This petition for a writ of certiorari is filed less than 90 days after denial of the rehearing petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the implied warranty of workmanlike service, owed by a contracting stevedore to its shipowner customer, which this Court has likened "to a manufacturer's warranty of the soundness of its manufactured product,"[1] include the warranty that equipment furnished and brought aboard the vessel by the stevedore for its own use in the stevedoring operations, shall be reasonably fit and suitable for the purpose intended, and free of latent defect?

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[1] *Ryan Stevedore Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 at pp. 133-34; *Crumady* v. *The J. H. Fisser*, 358 U.S. 423 at pp. 428-29; *Waterman S.S. Corp.* v. *Dugan & McNamara*, 364 U.S. 421 at p. 424.

2. What is the extent of a contracting stevedore's obligation to its shipowner customer with respect to equipment which the stevedore furnishes, brings aboard the vessel, and retains in its exclusive possession and control, for use in performance of its stevedoring services? Is it a duty to provide seaworthy equipment suitable for the use intended, or merely to avoid negligence?

3. Does a shipowner, who has been subjected to liability for injury to a longshoreman employee of the contracting stevedore, as a result of the stevedore furnishing and using equipment unsuitable because of latent defect, have a right to indemnity from the contracting stevedore?

STATEMENT OF THE CASE

Respondent, Oregon Stevedoring Company, performed stevedoring services on petitioner's vessel, the MS ANTONIO PACINOTTI, in the harbor of Portland, Oregon on November 19, 1958. The work was done pursuant to a written stevedoring contract which required the stevedore to furnish all necessary labor and supervision and all ordinary gear for the performance of the stevedoring services. (Tr. 23a). For use in the stevedoring operations, the stevedore furnished and brought aboard the vessel a tent to protect cargo from rain, with attached tie ropes. The tent and attached tie ropes were owned, supplied, rigged, and at all times exclusively controlled by the stevedore.

During the work of rigging the tent, done by the

stevedoring company as a part of its stevedoring services, while one Griffith, a longshoreman employee of the stevedoring company, was pulling on a tie-down rope, the rope broke, resulting in injury to Griffith. The rope broke because it was defective and unfit for the purpose intended (Tr. 25). It was of proper size, and should have been able to withstand a far greater pull than that which was being exerted at the time it broke. The defect was not visible, but latent, and there was no proof of negligence on the part of the stevedoring company.

Griffith sued petitioner shipowner in the State Court, and recovered a judgment which petitioner paid. Petitioner shipowner then brought suit for indemnity against respondent, the contracting stevedore, in the United States District Court for the District of Oregon, in admiralty, based upon the stevedoring contract, a maritime contract.[2] The District Court had original jurisdiction in admiralty pursuant to Title 28 U.S.C. § 1333(1). The District Court's Findings of Fact, summarized above, are set forth in full in the printed Transcript, pp. 23-26, and its Decree dismissed the libel. The Court of Appeals, which had jurisdiction pursuant to Title 28 U.S.C. § 1291, affirmed, in a decision by Judges Barnes and Hamlin, holding that the stevedore's liability upon its warranty was merely co-extensive with liability for negligence, and did not include a warranty against latent defects in equipment furnished and brought aboard the vessel by the stevedore. Judge Jertberg dissented, agreeing with the decision of the Court

[2] *American Stevedores v. Porello*, 330 U.S. 446, 456.

of Appeals for the Second Circuit, in *Booth S.S. Co.* v. *Meier & Oelhaf Co.*, 262 F. 2d 310 (1958), that the contractor's implied warranty is breached by furnishing defective equipment regardless of negligence.

REASONS FOR GRANTING THE WRIT

1. Importance of the Question.

In a series of recent cases this Court has ruled upon various aspects of the implied warranty of workmanlike service owed by the contracting stevedore to the owner of the vessel on which the stevedore performs its services. *Ryan Stevedore Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956); *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563 (1958); *Crumady* v. *The J. H. Fisser*, 358 U.S. 423 (1959); *Waterman S.S. Corp.* v. *Dugan & McNamara*, 364 U.S. 421 (1960). But the question involved in the present case has not heretofore been presented to this Court.

Under modern conditions in the industry, stevedore contractors bring aboard the vessel a large amount of their own equipment, such as cargo hooks, shackles, blocks, slings, cables, pallet boards, stowing winches, tractors, bulldozers, dollies, hand trucks, rain tents, and associated gear. As to all this stevedore-supplied gear, used in loading or discharging cargo, the shipowner is held to an absolute warranty of seaworthiness, and is liable to longshoremen employees of the stevedore who may be injured through latent defect in the gear. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 86; *Alaska S.S. Co.* v. *Petterson*, 347 U.S. 396.

It is therefore of great importance to the shipping industry for this Court to define the scope of stevedore responsibility to the shipowner for the condition of the stevedore-supplied gear.

2. Conflict in Decisions of Courts of Appeal.

There is a clear, express, and embarrassing conflict between the decision of the Court of Appeals for the Ninth Circuit in this case, and the decision of the Court of Appeals for the Second Circuit in *Booth S.S. Co. v. Meier & Oelhaf Co.*, 262 F. 2d 310 (1958).

In the *Booth* Case, the Court held that a shipyard contractor was liable to its shipowner customer for breach of implied warranty where the contractor supplied and brought aboard the vessel a defective wire strap which broke, causing injury to an employee of the contractor. The contractor was not negligent; the defect was latent. The shipowner was granted indemnity against the contractor for damages it had to pay the injured workman.

In the present case the majority opinion states:

> "We consider *Booth* to be indistinguishable from this case on the ground urged or any other . . . Any distinction in kind is without legal significance. However, we find ourselves in disagreement with the result reached in *Booth* that non-negligent action can give rise to indemnity liability. *Thus, we refuse to follow the Second Circuit on the point here involved.*" (Emphasis supplied) 310 F. 2d 484; App. hereto pp. 16-17.[3]

[3] Judge Jertberg forcefully dissented, and would follow the reasoning and the result in the *Booth* case. 310 F. 2d 488-93; App. hereto pp. 25-37.

Thus, there exists an outright and embarrassing conflict between the Court of Appeals which establishes the law for the Pacific Coast, and the Court of Appeals which establishes the law for the largest maritime Circuit on the Atlantic Coast, in the field of maritime law where there should be substantial uniformity.

3. The Decision of the Court of Appeals Is Inconsistent with Principles of Indemnity Announced by this Court.

It is true that the question presented is a novel one before this Court.

However, this Court has repeatedly stated that the stevedore's warranty of workmanlike service is "comparable to a manufacturer's warranty of the soundness of its manufactured product." *Ryan Stevedore Co.* v. *Pan Atlantic S.S. Co., supra* at pp. 133-34; *Crumady v. The J. H. Fisser, supra* at pp. 428-29; *Waterman S.S. Corp.* v. *Dugan & McNamara, supra* at p. 424. But the Court of Appeals majority decision, after noting this language (310 F. 2d at p. 483, App. p. 14), apparently dismisses it, and becomes involved with semantics of the word "workmanlike," which it equates to "non-negligent." (310 F. 2d at pp. 484-85; App. pp. 17-18).

Therefore, the majority apparently conclude that this Court did not really mean that the stevedore's warranty was closely comparable to the manufacturer's warranty. They also overlook the possibility there may be closely related, but separate, warranties,—i.e., a warranty of skillful labor and supervision, and a warranty of soundness of materials and equipment furnished.

Likewise, the Court of Appeals majority opinion gives no apparent consideration to the implications of this Court's statement in *Waterman S.S. Corp.* v. *Dugan & McNamara* that:

> "The ship and its owner are equally liable for a breach by the contractor of the owner's nondelegable duty to provide a seaworthy vessel. *The Osceola*, 189 U.S. 158, 175. Cf. *Continental Grain Co.* v. *The FBL-585*, 364 U.S. 19. The owner, no less than the ship, is the beneficiary of the stevedore's warranty of workmanlike service." 364 U.S. 421, at pp. 424-25.

It is well settled that the ship and its owner owe to the longshoreman employees of the stevedoring contractor the duty to provide a seaworthy vessel. *Sieracki, supra.* This duty is absolute and does not depend upon negligence, and extends to equipment brought aboard the vessel by the stevedore, over which the shipowner has no control. *Alaska S.S. Corp.* v. *Petterson, supra.* But, since this is true, and since the shipowner relies upon the expert stevedore, it would seem that the stevedore's warranty includes the absolute warranty to furnish equipment reasonably fit and suitable for the work at hand, and that this warranty is breached by furnishing equipment with a latent defect.

4. The Public Policy to Avoid Risk of Injury.

The Court of Appeals' decision runs counter to the strong public policy to protect workmen from injury.

Stevedore work is hazardous. Stevedore-furnished equipment may be used to suspend heavy loads over the heads of workmen.

The shipowner has no control over stevedore-furnished equipment, nor opportunity to keep records as to its prior age and use, or to make tests beyond the call of duty of ordinary care, or otherwise to take such steps to prevent the use of defective equipment as might be taken by the stevedore.

The shipowner, vis-a-vis the injured longshoreman, is subject to absolute liability, upon the warranty of seaworthiness, and is therefore responsible for the result of latent dangers he cannot prevent. *Sieracki, supra; Alaska S.S. Co.* v. *Petterson*, 347 U.S. 396, 401.

But to protect longshoremen from injury (rather than merely compensate them for damages) the ultimate burden should be placed upon the party best able to eliminate the hazard,—namely, the stevedoring contractor. The Court of Appeals for the Second Circuit has given considerable emphasis to placing the ultimate liability, as between shipowner and stevedore, on the party best able to minimize the risk. This was an important consideration in the *Booth* decision. See 262 F. 2d at pp. 314-15. It was expressed again by a different panel of the Second Circuit in *DeGioia* v. *United States Lines Co.*, 304 F. 2d 421:

> "The primary source of the shipowner's right to indemnity, as a practical matter, is his nondelegable duty to provide a seaworthy ship, by virtue of which he may be held vicariously liable for injuries caused by hazards which the longshoremen either created or had the primary responsibility or opportunity to eliminate or avoid. Waterman S. S. Corp. v. Dugan & McNamara, Inc., supra, 364 U.S. 421, 424-425, 81 S. Ct. 200, 5 L. ed. 2d 169, Paliaga

v. Luckenbach S.S. Co., 2 Cir., 301 F. 2d 403, 408. The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved. . . . The scope of the stevedore's warranty of workmanlike performance is to be measured by the relationship which brings it into being." (pp. 425-26)

But the majority opinion of the Court of Appeals in the present case has apparently given no consideration to this allocation of risk, and the important public policy to protect the working longshoremen by minimizing the risk of injury so far as possible.

CONCLUSION

For the foregoing reasons, petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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February 25, 1963.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Italia Societa Per Azioni di Navigazione,
Appellant,

vs.

Oregon Stevedoring Company, Inc.,
Appellee.

No. 17,616
Oct. 25, 1962

Appeal from the United States District Court for the District of Oregon.

Before: BARNES, HAMLIN and JERTBERG, Circuit Judges

HAMLIN, Circuit Judge:

Appellant, Italia Societa Per Azioni di Navigazione, a shipowner, contracted with the Oregon Stevedoring Company, Inc., appellee herein, for the performance of stevedoring services on appellant's ship, the M.S. Antonio Pacinotti. On or about November 19, 1958, during the course of stevedoring operations a longshoreman named Griffith, an employee of the stevedoring company, was injured due to a latently defective rope which had been brought onto the ship by the stevedoring company. Griffith recovered a judgment against appellant shipowner which it satisfied. Thereafter, in a separate action appellant shipowner brought suit against appellee stevedoring company claiming indemnity from appellee for the amount of the judgment which it had been required

to pay Griffith. Appellant based its claim for indemnity on the ground that the stevedoring company had been negligent and had breached its warranty of workmanlike service in supplying the defective rope. The stevedoring contract contained an express warranty whereby the stevedoring company undertook to indemnify the shipowner for negligence in the performance of its services.[1] The district court found that the stevedoring company had not been negligent in any way in bringing onto the ship the rope which caused injury to the longshoreman. The district court held that the presence of the express warranty covering negligence precluded any recovery for breach of an implied warranty of workmanlike service, in essence relying on the maxim *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another). Judgment was entered for the stevedoring company and the shipowner appealed to this court which has jurisdiction pursuant to 28 U.S.C.A. § 1291.

No complaint is made on this appeal of the district court's finding that the stevedoring company was not negligent. Appellant contends merely that an implied warranty of workman-like service arose from the con-

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[1] The express indemnity clause read:

The Stevedoring Company will be responsible for damage to the ship and its equipment and for damage to cargo or loss of cargo overside, and for injury or death of any person caused by its negligence, provided, however, when such damage occurs to the ship or its equipment, or where such damage or loss occurs to cargo, the ship's officers or other authorized representatives call the same to the attention of the Stevedoring Company at the time of occurrence. The Steamship Company shall be responsible for injury to or death of any person or for damage to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment.

tractual relationship between the parties which implied warranty placed a duty upon the stevedoring company to supply proper and seaworthy equipment. It is contended that a failure to supply seaworthy equipment is a breach of the implied warranty of workmanlike service which entitles the shipowner to indemnity for any liability it incurs resulting from the faulty equipment regardless of whether the stevedoring company was negligent in supplying the equipment. Assuming that there is an implied warranty which covers the facts of this case, the appellant shipowner argues that the mere presence of the express clause indemnifying for negligence does not preclude a recovery on the implied warranty. It will be unnecessary to consider the last contention if we determine that the warranty of workmanlike service does not include elements of liability without fault, i.e., that the stevedoring company absent negligence on its part does not warrant the suitability of the equipment which it supplies pursuant to its stevedoring contract.

We address ourselves, then, to the question whether a stevedoring company breaches its implied warranty of workmanlike service, which breach results in indemnity to the shipowner, when it supplies unseaworthy equipment to a ship on which it is to perform stevedoring services even though the stevedoring company has not been negligent in any way.

The leading case on indemnity liability for breach of the implied warranty of workmanlike service is *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). In that case a stevedoring company had agreed to perform stevedoring services and one of its employees

was injured during the unloading. A jury returned a verdict for the longshoreman against the shipowner. The shipowner had impleaded the stevedoring company claiming that it was entitled to full indemnity because the stevedoring company had negligently failed to stow the cargo in a safe and proper manner which negligence caused the shipowner to be liable to the longshoreman. The informal stevedoring contract made no reference to an express indemnity agreement. After rejecting the contention of the stevedoring company that indemnity was precluded by the provision in the Longshoremen's and Harbor Worker's Compensation Act which made a longshoreman's recovery of compensation his exclusive remedy against his employer,[2] the Court held that the shipowner was entitled to indemnity based on the stevedoring company's breach of its implied warranty of workmanlike service.

Prior to *Ryan* the Court had recognized that a stevedoring company could by contract expressly agree to indemnify the shipowner for any liability to longshoremen occasioned by the fault of the stevedoring company, *American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947). Where the contract did not deal expressly with indemnity such liability arose from the stevedoring company's obligation to perform its services in a workmanlike manner. The contractual obligation was described as a "warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product." The warranty "is of the essence of . . . [the]

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[2] Longshoremen's and Harbor Worker's Compensation Act § 5, 33 U.S.C.A. § 905.

stevedoring contract."[3] In *Ryan* the obligation was to stow the cargo "properly and safely" and a breach of the obligation was a breach of the warranty of workmanlike service giving rise to a right in the shipowner of indemnity against the stevedoring company for money which the shipowner became liable to pay to a longshoreman on account of the breach.

Much judicial effort since *Ryan* has been concerned with defining the nature and scope of a stevedoring company's implied warranty of workmanlike service. But only one case, *Booth S.S. Co. v. Meier & Oelhaf Co.*, 262 F.2d 310 (2nd Cir. 1958), has decided that the warranty of workmanlike service includes elements of liability without fault. In the *Booth* case a contractor who undertook to repair a ship brought some unseaworthy equipment on board which caused injury to a workman and as a result the shipowner was liable for unseaworthiness. Indemnity was sought from the contractor, but the district court dismissed the third-party claim of the shipowner since there had been no proof that the contractor had been negligent in supplying the equipment. On appeal the parties agreed that neither of them had been negligent, and the court stated that the question was whether the contractor could be liable for indemnity where it had supplied defective equipment without fault. Recognizing that the question had not been decided before, the court, nevertheless, did not believe that the leading cases on indemnity excluded "the existence of liability without fault as an element of the warranty of workmanlike service in appropriate cases."[4] After its discussion the court

[3] 350 U.S. at 133-134.

[4] 262 F.2d at 313. The court did not intimate what it meant by "appropriate cases".

stated:

> "[We] hold that if the contractor undertook to do the work of repair of the vessel's engines, and if he supplied the equipment which failed in the course of the use for which it was supplied, then the failure constituted a breach of the contractor's warranty of workmanlike service and rendered him liable to indemnify the owner for damages paid to the contractor's employee on account of injuries resulting directly from the failure."

Appellant shipowner in the instant case urges us to follow the Second Circuit's *Booth* decision and therefore hold the stevedoring company liable for indemnity for bringing onto the ship a defective rope even though the stevedoring company was not negligent in any way. Appellee stevedoring company argues that some negligence of the stevedoring company is required to constitute a breach of its implied warranty of workmanlike service. Appellee would also have us distinguish *Booth* from the instant case on the ground that *Booth* involved a repairman whereas this case involves a stevedoring company. We consider *Booth* to be indistinguishable from this case on the ground urged or any other. In the context of this case a repairman cannot be distinguished from a stevedoring company. Any distinction in kind is without legal significance. However, we find ourselves in disagreement with the result reached in *Booth* that non-negligent action can give rise to indemnity liability.[6]

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[5] 262 F.2d at 314-315.

[6] The Court in *Booth* felt that it was not unreasonable to require the supplier of equipment to test and inspect the materials "the omission of which would not constitute negligence." (262 F.2d at 314.) However, what the court was articulating was a basis for

Thus, we refuse to follow the Second Circuit on the point here involved.

It is our belief that the term "warranty of *workmanlike* service" is not properly susceptible to an interpretation which makes an act done free of negligence and totally without fault the basis of a breach of the warranty. We think the word "workmanlike" means a "proper", "safe" and "non-negligent" manner of doing something. "Workmanlike" has been defined as "skillful" or "well done" and is said to be synonymous with "deft", "proficient" or "adept",[7] all words which connotate a standard of skill similar to that associated with the reasonable man test for negligence. Cases discussing the legal meaning of "workmanlike" are replete with words and phrases of similar import.[8]

We have scutinized the leading Supreme Court cases in the field and have found in the Court's discussion terms the repeated use of which support a conclusion that "workmanlike" describes an ordinary standard of care in the performance of a service the breach of which standard is equivalent to negligence. Thus, in the *Ryan* case,

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strict liability without fault and it would seem that discussion of a burden to make tests the omission of which would not be negligence is inappropriate for the reason that standards of conduct and of performance are irrelevant where strict liability is imposed. Strict liability doesn't depend on what one does or does not do according to any set standard of care. The court's discussion would seem, rather, to be no more than an attempt to state a justification for risk-shifting from one party to another.

[7] Webster's New International Dictionary 2952 (2d ed. unabridged) ("workmanlike").

[8] See cases cited in 18A *Words & Phrases* 22 ("Good and Workmanlike Job") and 45 *Words & Phrases* 520 ("Workmanlike manner") (permanent ed.).

supra, the Court stated that the stevedoring company's contractual obligation is to stow the cargo "with reasonable safety," "properly and safely", and "in a reasonably safe manner"; the liability of the stevedoring company arises from "improper" stowage and the "failure to stow . . . 'in a reasonably safe manner' "; "competency and safety of stowage are inescapable elements of the service undertaken"; the recovery of the shipowner on his contract may turn upon the "standard of the performance" of the stevedoring service; and the duty of the stevedoring company is to hold the shipowner harmless from "foreseeable damages."

In *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958), the Court held that it was error to take a case from the jury on the question of indemnity where there was evidence tending to establish negligence on the part of the stevedoring company even though the shipowner had been held liable to the longshoreman only on the basis of negligence and not for unseaworthiness of the vessel.[9] In *Weyerhaeuser* much language from *Ryan* (which is set out above) was utilized, and the Court mentioned that the contractual obligation is to perform duties "with reasonable safety"; the stevedoring company is liable if in using ship's gear it renders a "sub-standard performance."

Statements similar to those in *Ryan* and *Weyerhaeuser* appear in the three later cases where the Supreme

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[9] The court recognized that at some point activity on the part of the shipowner would preclude its recovery of indemnity from the stevedoring company even though the stevedoring company might also be negligent in some respect. 355 U.S. at 567-568.

Court has had occasion to discuss the *Ryan* case and liability for indemnity. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962); Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960); Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959).

We are not unmindful that negligence liability and warranty liability are not identical. Negligence is a liability in tort while warranty is generally associated with contract liability.[10] Nevertheless, as indicated by the Supreme Court in *Ryan* the recovery of the shipowner in warranty still may turn upon a standard of perform-

[10] In recent history liability for breach of warranty has been associated with contract more than anything else. See Harper & James, *Torts* § 28.16 (1956) and Prosser, *Torts* § 84 (2d ed. 1955). But there is support for the proposition that warranty was originally a tort liability. Prosser, *Torts* 507 (2d ed. 1955). Increasingly, warranty is becoming a liability apart from tort perhaps because much of it does not necessarily depend on fault or the adherence to a standard of care; and warranty is drifting away from contract probably because many who are entitled to a recovery in warranty have no contractual relationship with the person from whom they seek to recover. Concepts of privity of contract are ever more gradually giving way to sweeping coverage of warranty. See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960). While the precise nature of warranty may in general be disputable, it is clear that the warranty of workmanlike service of a stevedoring company arises from contract. Of late, however, the importance of a contract between stevedoring company and shipowner (or ship in the case of a libel *in rem*) has been undermined; its presence is no longer a necessary condition to an indemnity based upon an implied warranty of workmanlike service, Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960); Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959). In *Waterman* and *Crumady* the shipowner was allowed to recover for breach of warranty even though there was no direct contract relationship between him and the stevedoring company. However, the contract idea was adhered to since the ship or shipowner were considered to be the third-party beneficiaries of the contract between the stevedoring company and the one who contracted for its services.

ance of the stevedoring service. We believe that in the stevedoring cases the standard of performance is the same whether the ultimate liability be in tort (for negligence) or in contract (for breach of warranty).

Our belief is not altered by the mere fact that there can be no liability of the stevedoring company in tort. In these indemnity cases there is no liability in tort, not because the standard would be different from that of warranty, but rather, because prior to *Ryan* the Supreme Court had decided that there could be no contribution, based on comparative fault, between shipowner and stevedoring company in respect of seamen's injuries on the ground that there had been no contribution in the common law between joint tort feasors. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952).[11] The entire liability in tort (including liability for unseaworthiness) would rest upon the shipowner since a longshoreman's right to workmen's compensation under the Longshoremen's and Harbor Workers' Compensation Act is his exclusive remedy against the wrongdoing of his employer, the stevedoring company.[12] This latter legislative reality when juxtaposed on the rule of the *Halcyon* case, *supra*, precluded any possibility of liability of the stevedoring company in tort. If the ship-

[11] In *Halcyon* a shipowner was sued by a longshoreman and the shipowner impleaded the employer stevedoring company. A jury determined that the shipowner had been 25% responsible for the longshoreman's injuries and that the stevedoring company had been 75% responsible. The district court equally divided the damages analogizing to collision cases. The Supreme Court held that there could be no contribution which lead to the result that shipowner who was only 25% responsible was liable for the whole while the 75% responsible stevedoring company was not liable at all.

[12] See note 2 *supra*.

owner was to be relieved at all from the onerous burden of *Halcyon*, liability against the stevedoring company for its wrongs would necessarily have to be predicated upon contract and not tort.[13] This background to *Ryan* cannot be separated from an analysis of the liability of the stevedoring company for breach of the implied warranty of workmanlike service. And when this background is kept in mind it seems reasonable to posit that the warranty of workmanlike service was intended only to impose liability in contract similar to that which would otherwise have been imposed in tort (for being negligent in the performance of stevedoring services)—not that the one (warranty) is the substitute for the other (tort) but that the standard of performance in each case is the same.

The efforts of the shipowner in this case to hold the stevedoring company for action done without fault is an attempt to impose upon the stevedoring company the same degree of liability for unseaworthiness as that which is imposed upon the shipowner. We see no reason in policy or otherwise why the stevedoring company should be liable for unseaworthiness insofar as that doctrine encompasses liability without fault.[14] Liability of the ship-

[13] See Gilmore & Black, *Admiralty* 366-374 (1957).

[14] Whether a particular set of facts gives rise to an action for negligence alone, for unseaworthiness alone or for both negligence and unseaworthiness is often an extremely difficult question. It has become quite evident that there is a very minute area, if any, which is negligence but not at the same time unseaworthiness. The continued existence of such an area is largely theoretical. The unseaworthy whale has all but swallowed the negligent Jonah. See generally Gilmore & Black, *Admiralty* § 6—34 - 6—44 (1957) and Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L.Q. 381 (1954).

owner for unseaworthiness arises where the ship's gear is not reasonably fit for the purpose for which it is intended. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960). The liability extends to longshoremen and other workmen who are injured while performing duties traditionally done by members of the ship's crew. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). And liability is imposed upon the shipowner even where the equipment which causes injury to a longshoreman is brought onto the ship by his employer, the stevedoring company. Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954). Just as the longshoreman is entitled to the warranty of seaworthiness while performing duties traditionally done by the ship's crew, the liability imposed with respect to equipment brought on board by the stevedoring company or other contractor would seem to rest upon the similar proposition that the gear was traditionally that which belonged to the ship. But the liability for unseaworthiness is the shipowner's not the stevedoring company's. The liability is absolute and non-delegable. Mitchell v. Trawler Racer, Inc., *supra*; Seas Shipping Co. v. Sieracki, *supra*; Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

The Supreme Court has recognized that the respective duties of the stevedoring company and the shipowner to the longshoreman rest upon different principles than do their liabilities with respect to each other.[15] In

[15] See Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 355 U.S. 563, 568 (1958) and Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 134 (1956).

view of this factor there would seem to be no necessary reason why a shipowner could not be liable without the stevedoring company always being liable at the same time to the shipowner. The shipowner is liable to the longshoreman for negligence and unseaworthiness and the stevedoring company is liable to the longshoreman for workmen's compensation, but this is not to say that as between the two the stevedoring company is liable to the same extent and upon the same basis as the shipowner. The stevedoring company's liability arises only from its contractual arrangement with the shipowner.[16] We believe the stevedoring company's warranty of workmanlike service is only breached (giving rise to indemnity) where it has rendered a substandard, negligent performance. Such negligence on the part of the stevedoring company can of course give rise to unseaworthiness liability of the shipowner and in that situation there would be indemnity.[17] But we believe indemnity liability cannot arise from non-negligent actions done entirely without fault. The liability of the shipowner to the longshoreman for unseaworthiness arises from a policy to protect the longshoreman at the expense of the shipowner who presumably is better able to shoulder the risk of loss. No doubt this policy in part received impetus from the historical dogma that seamen are the wards of the admiralty court. But the stevedoring company is not liable for unseaworthiness, and we can see no policy

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[16] *But see note* 10 *supra* in connection with *Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421 (1960) and *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959).

[17] *E.g.*, Crumady v. The Joachim Hendrik Fisser, *supra* note 16.

comparable to that which gives rise to the shipowner's liability which would compel an indemnity in favor of the shipowner where the stevedoring company has not been negligent.

We do not believe the Supreme Court's characterization of the warranty of workmanlike service as being "comparable to a manufacturer's warranty of the soundness of its manufactured product"[18] precludes the result reached in this case. It must be recognized that the warranty of workmanlike service is in some sense different from the manufacturer's warranty in that the former involves the performance of a service—unloading of vessels—while the latter attaches to a product that is made. Moreover, although some warranties result in strict liability of the manufacturer, certainly not all of them do.[19] We think a fair interpretation of all the language used in the leading cases (and the results reached in the plethora of other cases) is that the stevedoring companies are not liable for breach of the warranty of workmanlike service in the absence of some negligence.

We realize that stevedoring companies and shipowners enjoy considerable freedom of contract with respect to liability for indemnity, and we have no doubt that agreements could be made to cover expressly the action which we have said does not come within the implied warranty of workmanlike service. American Stevedores, Inc. v. Porello, 330 U.S. 446 (1947).

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[18] Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124, 133-34 (1956).

[19] See generally Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960).

In view of our decision that the warranty of workmanlike service could not have been breached without some negligence on the part of the stevedoring company (i.e., that there was no implied warranty covering liability without fault), we find it unnecessary to decide whether the district court was correct in holding that the presence of the express contract clause indemnifying for negligence precluded any implied warranty.

Judgment affirmed.

JERTBERG: Circuit Judge (dissenting)

I respectfully dissent. I do so only because of my view that the opinion of my brethren reaches a wrong result in an important and unsettled area of Admiralty law and one which will have far-reaching consequences.

The majority members of the panel conclude that the warranty of workmanlike service could not have been breached without some negligence on the part of the Stevedoring Company and found it unnecessary to decide whether the district court was correct in holding that the express contract clause indemnifying for negligence precluded any implied warranty.

Since I believe that the district court's dismissal of appellee's libel should be set aside and the cause remanded to the district court with instructions to enter judgment in its favor against appellee for the amount of the indemnity sought, it becomes necessary for me to first consider the issue not passed upon in the majority opinion.

The Seattle hatch tent and tent tie-down rope involved were owned, supplied, rigged and exclusively con-

trolled by appellee. The rope in question was permanently spliced to an eye in the tent. At the time of the accident, Griffith and his work partner had passed the rope through a deck fixture and back up and through the splice by which the rope was permanently attached to the tent. Griffith was pulling on the free end of the rope when it broke. It broke between the point where Griffith was holding it and the point where it ran through the splice. The securing of the tent and the manner in which the tent and tent rope were being secured were entirely and exclusively within the supervision and control of appellee. When the rope broke it was being used for the purpose and in the manner for which it was supplied by appellee for use by its employees. The rope was a proper type of rope for use as a tent rope and there was no evidence that it was in an unsatisfactory condition. When the rope broke it was defective and unsatisfactory for the purpose for which it was intended.

The provisions of the stevedoring contract existing between appellant and appellee which are relevant and pertinent on this appeal provide:

> "(a) That the Stevedoring Company will act as stevedores, and that they will with all possible dispatch, load and/or discharge all cargoes of vessels owned, chartered, controlled, or managed by the Steamship Company at all Columbia and Willamette River ports as directed. And it is agreed that the Steamship Company will grant to the said Stevedoring Company the exclusive rights of handling all such cargoes as before mentioned under the terms of this agreement, and will pay for the work done by the Stevedoring Company in lawful money of the United States at the rates set forth in Schedule 'A', attached hereto and made a part hereof;

"(b) That the Stevedoring Company will furnish all necessary labor and supervision and all ordinary gear for the performance of the services described in this contract, including winch drivers and usual appliances used for stevedoring;

"(c) That the Steamship Company will furnish suitable booms, winches, blocks, and falls, steam and/or power and lights and will maintain the same in safe and efficient working conditions during the progress of the work; and

"(d) That the Stevedoring Company will be responsible for damage to the ship and its equipment, and for damage to cargo or loss of cargo overside, and for injury to or death of any person caused by its negligence * * *. The Steamship Company shall be responsible for injury to or death of any person or for any damage to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment."

I shall first consider appellee's contention that appellant's right to indemnity must be determined from the provisions of the written stevedoring contract. Appellee argues that since the contract provides that appellee shall be responsible "for injury to or death of any person caused by its negligence" and since the district court found that appellee was not negligent in furnishing the defective rope, the decree of the district court dismissing appellant's libel must be affirmed.

The district court found that "there is no evidence, outside of the written contract itself, as to the intent of the parties with respect to construction or interpretation of the stevedoring contract, or with respect to implied obligations under said contract." Thus, there is presented

as a question of law whether under the contract the liability of appellee is limited to negligence and thereby negatives the existence of any obligation on the part of appellee to perform the stevedoring services in a workmanlike manner.

Was appellee under an obligation to render workmanlike service to appellant under the terms of the contract? It is to be noted that appellee agreed to act as stevedore and to load and discharge all cargoes of vessels owned, controlled, or managed by appellee at Columbia and Willamette River ports as directed. It is also to be noted that the contract does not contain an express agreement of indemnity unless the last quoted provision of the contract, properly construed, limits the liability of appellee to its negligence and bars indemnity.

Since the decision of the Supreme Court in *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), absent an express agreement of indemnity, it has been settled law that an agreement between a shipowner and a stevedore to perform loading and discharging of cargo includes the implied-in-fact obligation to render workmanlike service. In *Ryan*, a stevedoring company agreed to perform stevedoring services for the shipowner. The agreement was evidenced by letters, but without a formal stevedoring contract or an express indemnity agreement. One of the members of the stevedoring company was injured during the unloading. A jury returned a verdict for the longshoreman against the shipowner. The shipowner had impleaded the stevedoring company claiming that it was entitled to full in-

demnity because the stevedoring company had negligently failed to stow the cargo in a safe and proper manner which negligence caused the shipowner to be liable to the longshoreman. The Court held that the shipowner was entitled to indemnity based on the stevedoring company's breach of its implied warranty of workmanlike service. In the course of its opinion, the Court stated, at p. 133:

> "The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken."

In *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563 (1958), the Supreme Court held that it was error to take a case from the jury on the question of indemnity where there was evidence tending to establish negligence on the part of the stevedoring company even though the shipowner had been held liable to the longshoreman only on the basis of negligence and not for unseaworthiness of the vessel. The stevedoring contract contained no express indemnity clause. The Supreme Court held that the stevedoring company's implied-in-fact contractual obligation to perform its duties with reasonable safety embraced not only the handling of cargo but the use by the stevedore of ship's gear. In the course of its opinion, the Court stated, at p. 567:

> "We believe that respondent's [stevedoring company] contractual obligation to perform its duties with reasonable safety related not only to the han-

dling of cargo, as in *Ryan*, but also to the use of equipment incidental thereto, such as the winch shelter involved here."

The implied-in-fact obligation of the stevedore to render service in a workmanlike manner is not based upon tort. As stated by the Supreme Court in *Ryan, supra*, at p. 133:

> "This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service."

In *Crumady v. The J. H. Fisser*, 358 U.S. 423 (1959), the Supreme Court stated, at pp. 428-429:

> "A majority of the Court ruled in *Ryan Co. v. Pan-Atlantic Corp.*, 350 U.S. 124, that where a shipowner and stevedoring company entered into a service agreement, the former was entitled to indemnification for all damages it sustained as a result of the stevedoring company's breach of its warranty of workmanlike service. And see *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563. The facts here are different from those in the *Ryan* case, in that this vessel had been chartered by its owners to Ovido Compania Naviera S. A. Panama, which company entered into the service agreement with this stevedoring company. The contract, however, mentioned the name of the vessel on which the work was to be done and contained an agreement on the part of the stevedoring company 'to faithfully furnish such stevedoring services.'

> "We think this case is governed by the principle announced in the *Ryan* case. The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, § 133. Moreover, as we said in the *Ryan* case, 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U.S., at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Id.*, at 133-134. See *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050."

See also *Waterman Co. v. Dugan & McNamara*, 364 U.S. 421 (1960), wherein it was held that a stevedoring company was liable to the shipowner for indemnity even though there was no privity of contract between them and regardless of whether the injured longshoreman asserted his claim in an *in rem* or an *in personam* proceeding, since the stevedore's warranty of workmanlike service aboard the ship was for the benefit of the ship and its owner as well as the stevedore.

I am of the view that the provision of the stevedoring contract under which appellee agrees to be responsible "for injury to or death of any person caused by its negligence," which statement is simply an affirmation of an existing duty on the part of appellee, does not exclude from the stevedoring contract the implied-in-fact obligation to perform stevedoring services in a workmanlike manner, nor do I find any other provision of the contract or the contract as a whole to have any such effect. The

obligation of the stevedore to indemnify the shipowner rests not upon negligence but upon contract. The contract does not limit such obligation.

The final question is whether the implied-in-fact contractual obligation of appellee to render its services in a workmanlike manner embraces within its scope the duty to see that the equipment or gear required to be and furnished for the use of its own employees in the performance of its stevedoring services and exclusively used and controlled by them, must be seaworthy and fit for the use intended. Under the contract, appellee agreed to furnish not only all necessary labor and supervision but also "all ordinary gear for the performance of the services described in this contract, including winch drivers and usual appliances used for stevedoring." There is no contention in the record that the Seattle hatch and tent tie-down rope were not ordinary gear which appellee was obligated to furnish under the terms of the contract.

I have found no Supreme Court decision which has occasion to pass upon the duty of a stevedoring company vis-a-vis the shipowner in respect to gear or equipment required to be and furnished by it in the performance of stevedoring services. I recognize that liability has been imposed upon a shipowner for breach of the implied warranty of seaworthiness in favor of a longshoreman whose injuries were caused aboard ship by defective gear or equipment belonging to and brought on the ship by his employer—the stevedoring company. *Alaska Steamship Co., Inc. v. Petterson*, 347 U.S. 396 (1954). The right of the shipowner to recover indemnity from the stevedoring

company was not involved in that case. I have found no intimation in the many decisions of the Supreme Court which I have reviewed that a shipowner would be denied the right to indemnity against the stevedoring company in instances where liability has been imposed on the shipowner either for damages to person or property caused solely by defective equipment furnished by the stevedoring company and exclusively used, controlled, and supervised by it. To impose liability on the shipowner in favor of a longshoreman and to deny recovery over against the stevedoring company under such circumstances, is inequitable. Since the loss must be borne by either one or the other, it is not unfair that such loss be ultimately borne by the one best able to eliminate the hazard, to wit: the owner of the defective gear or equipment who supplied it and whose use and control over it was exclusive.

In my view, the Supreme Court decisions above cited do not exclude the existence of liability without fault as an element of the warranty of workmanlike service under the facts of this case.

In *Ryan, supra,* it is stated, at pp. 133-134:

> "It is petitioner's [stevedore's] warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product."

This statement was reaffirmed by the Supreme Court in *Waterman, supra,* and in *Crumady, supra.*

The only case passing upon this point to which attention has been directed is *Booth Steamship Co. v. Meier*

Oelbaf Co., 262 F.2d 310 (2nd Cir. 1958). The majority opinion states that *Booth* is indistinguishable in any significant way from the instant case but disagrees with the result reached in the *Booth* case. In *Booth*, a contractor undertook to overhaul the engines on Booth's vessel. One of the first steps in the execution of the work was the extraction of tight fitting cylinder liners from the engine block, and this was undertaken by means of extracting equipment consisting essentially of a rigid bar, or strongback, which was attached to the liner, and a jack, which was used to raise the liner by raising the strongback. Because the lifting arm of the jack was relatively short, it was necessary periodically to suspend the strongback holding the liner from a wire strap while the jack itself was lifted up. It was while the strongback was so suspended that the strap parted, allowing the strongback to fall and sever the thumb of the plaintiff, who was engaged in elevating the jack itself for further lifting.

The shipowner was held liable to the injured workman of the contractor for unseaworthiness. The shipowner sought indemnity from the contractor, but the district court dismissed the third-party claim of the shipowner since there had been no proof that the contractor had been negligent in failing to discover the defect in the strap, which defect was latent and not discoverable on visual inspection.

In the course of its opinion, the court stated, at pp. 314-315:

> "The implied warranty of suitability for a particular use made by manufacturers and retailers is generally considered absolute, however, and is not

avoided by the fact that in the exercise of ordinary care the defendant could not discover the injury-causing defect. See 1 Williston on Sales § 237 (Rev. Ed. 1948 and Supp. 1958). It has repeatedly been suggested that the liabilities of suppliers should be co-extensive with those of the law of sales. See 4 Williston on Contracts § 1041 (1936 Ed.); 2 Harper and James, The Law of Torts, § 28.19 (1956); Prosser on Torts 496 (2d Ed. 1955). In Shamrock Towing Co. v. Fitcher Steel Corp., 2 Cir., 1946, 155 F.2d 69 we stated in dictum that the warranty of a supplier of marine equipment was as absolute as the maritime warranty of seaworthiness, see The H. A. Scandrett, 2 Cir., 1937, 87 F.2d 708; that it therefore made no difference whether a defect was discoverable; that as a result both warranties would be breached in the event that the chattel supplied proved inadequate to the purpose for which it was supplied under normal conditions of use. We see no reason to alter that opinion.

"Like the manufacturer or retailer the supplier profits from the bailment or lease of his equipment. Although he is unable to prevent defects arising in the course of manufacture, his expert knowledge of the characteristics of the equipment in use should enable him to detect them more readily than the user. It is therefore not less reasonable as an incident of his contract to charge him with the duty of making tests, the omission of which would not constitute negligence, than it is to charge the manufacturer or retailer with a similar responsibility. We think that this is particularly true when the chattel is supplied, as it presumably was here, in the partial fulfillment of a general undertaking to make repairs. In such circumstances the hirer defers to the special qualifications of the contractor in both the selection and use of the equipment. Relying on the supplier's control of the work and with confidence in the supplier's expert knowledge and competence, he makes at most only a routine inspection of the equipment employed.

To say that the supplier warrants the equipment merely confirms the customary reliance which flows from such a relationship and which affords an appropriate remedy.

"Applying general principles to the facts of this case, we find that the defect which caused the plaintiff's injury was not detectable by the ordinary visual inspection which the vessel's officers on the scene may be expected to make. Such latent defects in wire as are undetectable on visual inspection may result from improper manufacture or from fatigue resulting from use over a period of time. They may perhaps be discovered by subjecting the equipment to appropriate tests with safety factors in excess of the contemplated undertaking. Futhermore, it is the supplier and not the ship owner who knows the actual history of prior use of the equipment. He alone is in the position to establish such retirement schedules or periodic retests as will best prevent the development of visually undetectable flaws.

"Accordingly we hold that if the contractor undertook to do the work of repair of the vessel's engines, and if he supplied the equipment which failed in the course of the use for which it was supplied, then the failure constituted a breach of the contractor's implied warranty of workmanlike service and rendered him liable to indemnify the owner for damages paid to the contractor's employee on account of injuries resulting directly from the failure."

I find no significant fact which distinguishes the *Booth* case from the instant case. Much that is said in *Booth* can be applied with equal force to this case. I see no policy considerations in Maritime law, and no injustice in requiring a stevedore to indemnify a shipowner from a liability visited upon the shipowner solely through faliure on the part of the stevedore to furnish, in connection with

the performance of a stevedoring contract, equipment that is fit for the use intended.

It is to be noted that the case presented to us is that of the shipowner vis-a-vis the stevedoring company. We are not concerned with the injured longshoreman who has received compensation for his injuries, nor policy considerations which have led to a tender solicitude on the part of the Admiralty Court for injured seamen and longshoremen. The contest here is between equals and no thought should be given to which of them is more able to bear the burden.

I would set aside the decree of the district court dismissing appellee's libel and would remand the cause to the district court with instructions to enter judgment in its favor against appellee for the amount of the indemnity sought.

(Endorsed) Opinion and Dissenting Opinion Filed Oct. 25, 1962.

Frank H. Schmid, Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

"Docketed"

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE, Appellant,	)	
vs.	)	No. 17.616
	)	JUDGMENT
OREGON STEVEDORING COMPANY, INC. Appellee	)	

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Ccurt for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered and adjudged by this court that the appellee recover against the appellant for its costs herein expended, and have execution therefor.
Filed and entered October 25, 1962.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 82

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,
Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,
Respondent.

BRIEF OF RESPONDENT OREGON STEVEDORING COMPANY, INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-63

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 876

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,
Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,
Respondent.

BRIEF OF RESPONDENT OREGON STEVEDORING COMPANY, INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

One important fact is omitted in Petitioner's Statement of the Case. Respondent, Oregon Stevedoring Company, Inc., was performing its services to Petitioner under a contract by which the stevedoring company agreed to be responsible for personal injury caused by its negligence and the Petitioner agreed to be responsible for injury caused by its negligence or by failure of the ship's gear (Appx. p. 12). The District Court found

that the stevedoring company had not been negligent in any way and this finding was not contested on appeal (Appx. p. 12).

REASONS WHY PETITION SHOULD NOT BE GRANTED

1. This Case Did Not Decide an Important Question of Maritime Law.

In the six years since the decisions in *Ryan Stevedore Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), only two cases have considered the question of the responsibility of a contractor to a shipowner when that contractor is free from fault. The one case is *Booth S.S. Co. v. Meier & Oelhaf Co.*, 262 F.2d 310 (1958) involving a repair contractor. The other is the instant case. Obviously, the issue arises in very few cases.

Secondly, this Court has already established the principle of law invplved. In *Ryan Stevedore Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. at 130, this Court said in reference to contractural obligation of a stevedore to a shipowner that such language constitutes "a contractual undertaking to stow the cargo 'with reasonable safety' . . .". In the instant case, the trial court after hearing the evidence determined that the stevedore had performed with reasonable safety. The Petitioner merely failed to sustain its burden of proof and is dissatisfied with the result. This Court should not be expected to decide as a matter of law that a certain set of facts establishes a breach of warranty when the issue is one of fact under the test laid down by this Court in the *Ryan*

case. *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563, 567, 568.

2. A Conflict in the Decisions of Courts of Appeal Will Not Be Removed by a Decision of this Court in this Case.

That there is a conflict between the Courts of Appeal in the Ninth Circuit and the Second Circuit on the interpretation of the term "warranty of workmanlike service" as it relates to suppliers of services to a ship is obvious. However, a decision by this Court in the instant case will not resolve the conflict. In the *Booth S.S. Co.* case, 262 F.2d 310 (1958), there was no express contract defining the responsibilities of the contracting parties. In the instant case, a contract set forth the respective responsibilities of the parties (Appx. p. 12). A decision by this Court, even if favorable to Petitioner, will only mean that the case will be sent back to the Court of Appeals for a determination of the meaning of the express contract. There is not presented to this Court the clear-cut question whether an implied warranty of workmanlike service includes indemnity insurance for non-negligent conduct because in this case the contracting parties specifically agreed upon their respective responsibilities.

3. The Decision of the Court of Appeals is Not in Conflict with Applicable Decisions of this Court.

The Court of Appeals in its opinion carefully reviews the decisions of this Court which have discussed the test to be applied in defining the warranty of workmanlike service (310 F.2d at pp. 484-487; Appx. pp. 17-20). The conclusion of the Court of Appeals that the test is one

of negligence or fault is buttressed by much language cited by the Court of Appeals.

Petitioner's assertion regarding the implications of the language in *Waterman S.S. Corp.* v. *Dugan & McNamara*, 364 U.S. 421, 424, is wholly without merit. The language quoted is to the effect that both the owner and the ship are liable to a longshoreman if a stevedore causes a vessel to become unseaworthy. This Court was referring to the contention made by the Respondent stevedore that the fact the longshoreman's original claim was in personam rather than in rem should make a distinction in the indemnity claim by the shipowner. This Court merely pointed out that the owner as well as the ship itself is a beneficiary of the warranty of workmanlike service.

As a matter of fact, the language of this Court in the *Waterman* case illustrates the consistency between the opinion of the Court of Appeals in the instant case and the decision of this Court. This Court states at p. 423:

> "The warranty may be breached when the stevedore's *negligence* (italics ours) does no more than call into play the vessel's unseaworthiness."

The warranty is one of non-negligent conduct and this is exactly what the Court of Appeals holds in the instant case. This Court in the case of *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Company*, 355 U.S. 563 (1958) points out that the respective liabilities of shipowner and stevedore rest on different principles. The shipowner's liability to the longshoremen rests on the

failure of the shipowner to perform a non-delegable duty to provide a seaworthy ship. The liability of the stevedore to the shipowner rests on its obligation to perform its stevedoring operations with reasonable safety. 355 U.S. at 567, 568. It is a question of fact whether the stevedore has so performed and here the finding of fact by the trial court is that the stevedore did perform with reasonable safety. There is no conflict at all between the decision of the Court of Appeals and applicable decisions of this Court.

4. There is no Public Policy Consideration to Avoid Risk of Injury in this Case.

This claimed ground for allowing certiorari is without merit. The trial court found and it is not contested that there was no fault on the part of the stevedore. The decision in this case does not allow a negligent stevedore to escape liability. The Petitioner complains that the stevedore has a better opportunity to keep records and make tests of its equipment; but, there is no proof in this case of any failure to keep records or make tests. All that this decision imports is there must be some proof of such failure as suggested by Petitioner. Petitioner falls into the same error as noted by the Ninth Circuit in its footnote 6 at page 484 of its opinion (Appx. p. 16). What sense does it make to impose liability without fault and then base it on considerations of fault?

What Petitioner is really complaining about is that it is liable to the longshoreman without fault. Unfortunately for the shipowner, that is the law applicable to his calling. Here, he complains that his rights against

others are not as great as the longshoreman's rights against him. To allocate the risk in this case to the stevedore is to allocate the risk to another party, who is at least as innocent as the shipowner. Presumably, the shipowner is just as financially able to shoulder the risk of loss as the stevedore.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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In the Supreme Court

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OCTOBER TERM, 1962

No. 82

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,

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OREGON STEVEDORING COMPANY, INC.,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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In the Supreme Court
of the United States

OCTOBER TERM, 1962

No. 876

ITALIA, SOCIETA PER AZIONI DI NAVIGAZIONE,
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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent's (stevedore's) brief argues that the stevedore was not negligent, and the District Court so found. That is irrelevant. It is conceded and not an issue. The contracting stevedore's liability for indemnity is based upon principles of contract,—not of tort. *Ryan Stevedore Co.* v. *Pan-Atlantic S.S. Co.*, 350 U.S. 124; *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563.

The stevedore undertook to perform stevedoring

services and to furnish all ordinary gear necessary therefor. The question is not one of negligence, nor the imposition of tort liability without fault. The question is whether the contracting stevedore breaches the implied warranties of the stevedoring contract by furnishing unseaworthy gear.

In this case the shipowner was subjected to liability to an injured longshoreman because the contracting stevedore furnished and brought aboard a piece of defective unseaworthy equipment. Neither the shipowner nor the stevedore were negligent. But it was the stevedore that furnished the defective equipment, and thus created the unseaworthy condition, and imposed the liability on its customer shipowner.

The issue is clearly one of law, and not of fact as respondent would have it appear. The issue is whether the contracting stevedore, as a part of, or in addition to, its implied warranty of workmanlike service, owes the shipowner the implied warranty that equipment furnished by the stevedore and brought aboard the vessel shall be reasonably suitable for its intended use,—in short, seaworthy. (See the issue as stated by the Court of Appeals, Petition for Cert. Appendix p. 13, and in the dissenting opinion, Appendix p. 32.)

Respondent states, "the trial court after hearing the evidence determined that the stevedore had performed with reasonable safety" (Brief in opposition, p. 2, 5). That is not correct. The trial court simply found that the stevedore had used reasonable care and was not negligent. It also found that the stevedore in fact furn-

ished and brought aboard a piece of defective equipment, unfit for the purposes intended. (Tr. of Record, p. 25) Obviously, the stevedore did *not* perform its contract with reasonable safety, when it actually furnished a piece of defective equipment which caused injury to the longshoreman.

Respondent urges that the District Court decided the case upon the interpretation of the stevedore contract. True. But the majority of the Court of Appeals did not pass upon interpretation of the contract.[1]

The Court of Appeals simply held as a matter of law that a contracting stevedore does not warrant seaworthiness of equipment which it furnishes. It holds as between shipowner and stevedore who are both non-negligent, the shipowner must bear the loss, even though it was the stevedore who owns and furnishes and brings aboard the vessel unseaworthy equipment which results in injury and thus imposes liability upon the shipowner. In this, the Court of Appeals for the Ninth Circuit has decided a very important question of law in a manner directly in conflict with the Second Circuit's decision in the *Booth* case. Review by this Court will resolve this conflict.

The petition for certiorari should be granted for the reasons set forth therein.

Respectfully submitted,

ERSKINE B. WOOD,
Counsel for Petitioner,
1310 Yeon Building,
Portland 4, Oregon.

April 5, 1963.

[1] The dissenting opinion held that the contract did not preclude the implied warranty.

IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 82

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,
Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF POSITION OF PETITIONER, ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE

J. WARD O'NEILL
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840 Central Building
Seattle 4, Washington

Of Counsel
SCOTT H. ELDER
J. STEWART HARRISON

CERTIORARI GRANTED APRIL 15, 1963

METROPOLITAN PRESS [redacted] SEATTLE, WASH.

IN THE

Supreme Court of the United States

October Term, 1962

No. 876

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,
Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,
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CERTIORARI GRANTED APRIL 15, 1963

IN THE

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No. 876

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,
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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF POSITION OF PETITIONER, ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE

To the Honorable Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States

AMERICAN MERCHANT MARINE INSTITUTE, INC., a nonprofit New York membership corporation, PACIFIC AMERICAN STEAMSHIP ASSOCIATION, a nonprofit California corporation, and LAKE CARRIERS' ASSOCIATION, a voluntary association, do hereby respectfully move for leave to file a brief as *amici curiae* in support of the position of the shipowner and petitioner, Italia Societa Per Azioni Di Navigazione, on Petition for Certiorari as granted April 15, 1963 in this cause.

Petitioner has consented to the filing of this *amici curiae* brief, but such consent, when sought from the respondent, Oregon Stevedoring Company, under the provisions of Supreme Court Rule 42, has been refused by counsel for the respondent (see Appendix).

AMERICAN MERCHANT MARINE INSTITUTE, INC. has a membership of 41 steamship companies oper-

ating cargo, tanker, collier and passenger vessels under the American flag. These companies have a total vessel tonnage of more than 5,698,000 gross tons, representing about 57 per cent of the American Flag merchant marine operating in foreign and domestic trades.

PACIFIC AMERICAN STEAMSHIP ASSOCIATION is a nonprofit corporation, organized under the laws of the State of California. Its members own and operate merchant vessels under the American flag, having a total tonnage of approximately 1,000,000 gross tons. These vessels constitute over 90 per cent of all domestic merchant vessels now in service whose owners have headquarters on the Pacific Coast.

LAKE CARRIERS' ASSOCIATION is a voluntary organization of owners and operators of vessels under the American flag engaged in commerce on the Great Lakes. It has 25 member companies with 241 merchant vessels presently enrolled in the Association. These vessels have an aggregate of more than 1,870,000 gross tons, constituting 97 per cent of all commercial vessels under the American flag now engaged in domestic commerce on the Great Lakes.

Moving parties are interested in the outcome of this case because of the very important question presented as to the basis for recovering indemnity between shipowners and independent contractors such as stevedores, ship repair yards, suppliers or servicemen for amounts which the shipowner or operator may be initially held liable to pay by way of damages to seamen, longshoremen or any other persons entitled to the benefit of a warranty of seaworthiness from the shipowner-operator.

The moving parties are concerned with the impact of the decision in this case on the entire steamship industry. The issue relates to whether independent contractors will be allowed to avoid ultimate intrinsic responsibility for indemnity on damages awarded to seamen, longshoremen or others against shipowners or operators where the cause of the injury is defective equipment or material supplied, brought aboard vessels and used by such independent contractors.

If the decision of the Court of Appeals for the Ninth Circuit in this case is affirmed, it would seriously impair the recovery of indemnity by shipowners from independent contractors where the shipowner's initial liability is based upon breach of the warranty of seaworthiness without negligence or fault upon the part of the shipowner-operator.

The moving parties believe that the Court of Appeals for the Ninth Circuit, by a divided panel (2 to 1), has failed to properly construe several recent decisions of this Court regarding a stevedore's or contractor's implied warranty of workmanlike service[1] by improperly attaching to this implied warranty an unjustified and unintended condition that the shipowner-operator must prove negligence of the independent contractor before it is entitled to recover indemnity for losses and damages that the shipowner-operator has initially been required to bear because of its absolute liability under the seaworthiness warranty.[2]

---

[1] *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124; *Weyerhaeuser SS Co. v. Nacirema Operating Co.*, 355 U.S. 563; *Waterman SS Corp. v. Dugan & McNamara*, 364 U.S. 421.

[2] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85.

The moving parties intend in their brief to support the position of the shipowner as petitioner herein by citation of authorities relating to the origin and development of the implied warranty of workmanlike service which has been likened to a manufacturer's warranty of soundness of its product.[3] The moving parties also intend to analyze in their *amici curiae* brief the more logical reasoning of the Court of Appeals for the Second Circuit in *Booth SS Co. v. Meier & Oelhaf*, 282 F.2d 310 (CA 2, 1958) and in the dissenting opinion for the Court of Appeals for the Ninth Circuit in the present case. 310 F.2d 481, 488 (R. 54-63). In addition, *amici curiae* will undertake to show that the result of the decision of the Court of Appeals for the Ninth Circuit is inequitable and that a stevedore or other independent contractor, who supplies equipment or material which it brings aboard a vessel and which subsequently fails and causes injury while being used by the contractor, should be the party to bear the ultimate financial burden, rather than the shipowner-operator, who has not been guilty of any negligence with respect to the installation and use of such equipment or material by the contractor.

The moving parties expect that, while petitioner will present a carefully prepared brief in support of its position, its brief will be directed primarily to the facts in this particular case. The moving parties feel that they are in the best position as *amici curiae* to represent and bring to the attention of this Court the viewpoint and position of a major segment of all shipowners and operators and to demonstrate to this Court the serious impact

[3] *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124, 142.

of the decision upon the entire merchant marine industry.

Based upon the above, it is respectfully requested that this Motion for Leave to File *Amici Curiae* Brief be granted under the provisions of Rule 42 of Supreme Court General Rules, a copy of said brief being attached to this Motion.

Respectfully submitted,

J. WARD O'NEILL
CHARLES B. HOWARD
Counsel for Amici Curiae

c/o SUMMERS, HOWARD & LE GROS
840 Central Building
Seattle 4, Washington

Of Counsel
SCOTT H. ELDER
J. STEWART HARRISON

CERTIFICATE OF SERVICE

I, CHARLES B. HOWARD, one of counsel for American Merchant Marine Institute, Inc., Pacific American Steamship Association and Lake Carriers' Association, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 19th day of August, 1963, I served copies of the foregoing Motion for Leave to File *Amici Curiae* Brief on counsel for all parties of record by mailing copies of said Motion, with copies of *Amici Curiae* Brief attached, in sealed envelopes, deposited in the U.S. mail at Seattle, Washington, with postage prepaid and addressed as follows:

Erskine B. Wood
Wood, Wood, Tatum, Mosser & Brooke
1310 Yeon Building
Portland 4, Oregon

Floyd A. Fredrickson
Gray, Fredrickson & Heath
1021 Equitable Building
Portland 4, Oregon

CHARLES B. HOWARD
840 Central Building
Seattle 4, Washington

APPENDIX

(Letterhead of)

WOOD, WOOD, TATUM, MOSSER & BROOKE

August 2, 1963

Subject: United States Supreme Court
Italia Societa v. Oregon
Stevedoring Co., October Term,
1963, No. 876

Charles B. Howard, Esq.
Summers, Howard & LeGros
Central Building
Seattle 4, Washington

J. Ward O'Neill, Esq.
Haight, Gardner, Poor & Havens
80 Broad Street
New York 4, N.Y.

Gentlemen:

This letter will confirm that on behalf of petitioner, Italia Societa per Azioni di Navigazione, we hereby consent to the filing of a brief amicus curiae in this case on behalf of associations of American steamship owners, including the American Merchant Marine Institute and the Pacific American Steamship Owners Association.

Very truly yours,

ERSKINE B. WOOD
Counsel for Petitioner
Italia Societa

EBW/rjk

(Letterhead of)

GRAY, FREDRICKSON & HEATH

July 24, 1963

Charles B. Howard, Esq.
840 Central Building
Seattle 4, Washington

Dear Sir:

We acknowledge receipt of your telegram dated July 24, 1963, requesting leave to file a brief amicus curiae on behalf of various associations of American steamship owners in the case of Italia Societa Per Azioni de Navigazione vs. Oregon Stevedoring Company, Inc. now pending in the United States Supreme Court on writ of certiorari.

This will confirm our telephone advice to you of yesterday that we are unable to consent to your request.

Very truly yours,
WENDELL GRAY

WG:js

IN THE

Supreme Court of the United States

October Term, 1962

No. 876

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,
Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,
Respondent.

BRIEF ON BEHALF OF AMERICAN MERCHANT MARINE INSTITUTE, INC., PACIFIC AMERICAN STEAMSHIP ASSOCIATION and LAKE CARRIERS' ASSOCIATION AS AMICI CURIAE

J. WARD O'NEILL
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J. STEWART HARRISON

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IN THE

Supreme Court of the United States

October Term, 1962

No. 876

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,
Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,
Respondent.

BRIEF ON BEHALF OF AMERICAN MERCHANT MARINE INSTITUTE, INC., PACIFIC AMERICAN STEAMSHIP ASSOCIATION and LAKE CARRIERS' ASSOCIATION AS AMICI CURIAE

I.

STATEMENT OF INTEREST

AMERICAN MERCHANT MARINE INSTITUTE, INC., has a membership of 41 steamship companies operating cargo, tanker, collier and passenger vessels under the American flag. These companies have a total vessel tonnage of more than 5,698,000 gross tons, representing about 57 per cent of the American Flag merchant marine operating in foreign and domestic trades.

PACIFIC AMERICAN STEAMSHIP ASSOCIATION is a nonprofit corporation, organized under the laws of the State of California. Its members own and operate merchant vessels under the American flag, having a total tonnage of approximately 1,000,000 gross tons. These vessels constitute over 90 per cent of all domestic merchant vessels now in service whose owners have headquarters on the Pacific Coast.

LAKE CARRIERS' ASSOCIATION is a voluntary organization of owners and operators of vessels under the American flag engaged in commerce on the Great Lakes. It has 25 member companies with 241 merchant vessels presently enrolled in the Association. These vessels have an aggregate of more than 1,870,000 gross tons, constituting 97 per cent of all commercial vessels under the American flag now engaged in domestic commerce on the Great Lakes.

The members of the aforementioned groups as *amici curiae*, and all other shipowners-operators, will be directly affected by the decision in this case because of the frequent necessity in routine and normal operations of employing third party-independent contractors, such as stevedore companies, ship repair companies or other ships' service or supply companies, to perform services and provide equipment and materials for use by such contractors in operations aboard merchant vessels.

For example, statistics supplied by the New York Shipping Association show that in the contract year October 1, 1961, to September 30, 1962, there were 42,023,096 man-hours of labor performed by harbor workers aboard vessels in the Port of New York. Of these, 32,774,265, or 78 per cent, were performed by employees of independent contractors.

By contract and custom, equipment or materials supplied and brought aboard by such independent contractors are frequently used exclusively by the contractors' employees under their direct supervision. Shipowners and operators have little or no opportunity to inspect and test the equipment or material for the failure of which they

may be held legally liable. If such equipment or materials, when brought aboard merchant vessels by third parties as independent contractors, are defective and cause personal injuries to seamen, longshoremen, ship repairmen or other workers engaged in work traditionally performed by seamen, these persons may be entitled to recover damages from the shipowner or operator on the basis of the absolute warranty of seaworthiness, even though there is no negligence on the part of the shipowner or operator.[1]

The question which concerns *amici curiae* in this case is whether a stevedoring company, or other independent contractor supplying equipment or material for use aboard a vessel, breaches its implied warranty of workmanlike service when it supplies latently defective equipment or material which is used in performance of the contractor's services, although there is no proof that the contractor has been negligent.

In considering this question on the basis of the present record, the following factors are pertinent:

(1) The equipment or material is supplied and used aboard the vessel by the stevedore or other independent contractor (Finding of Fact (16) and (17) R. 25);

(2) The defect in the equipment or material is latent, not patent (Finding of Fact (21) R. 26);

(3) The stevedore or other independent contractor supervises and performs the operations being conducted on the vessel when the accident causing injuries occurs (Finding of Fact (18) R. 25);

(4) The shipowner-operator is not guilty of any negligence in connection with the operation involving

[1] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Alaska SS Co. v. Petterson*, 347 U.S. 396 (1954).

use of the latently defective equipment or material;

(5) The stevedore or other independent contractor is not negligent in supplying the latently defective equipment or material (Finding of Fact (22)-R. 26).

II.

SUMMARY OF AMICI CURIAE ARGUMENT

It is the position of *amici curiae* that, where an independent contractor, such as the respondent stevedore company herein, has impliedly warranted its performance of workmanlike service aboard a vessel, this includes the obligation to provide adequate and proper equipment and material to be used in performance of the contractor's work. If the independent contractor supplies equipment or material that is latently defective and causes injuries for which the shipowner-operator becomes initially liable under its seaworthiness warranty to seamen, longshoremen or others, then we submit that the law relating to such implied warranty entitles the shipowner-operator to recover full indemnity from the contractor, even though the independent contractor has not been found to be negligent.

The above position is sound, not only upon the basis of a proper application of the law as it has developed relating to warranties but also, upon the basis of equities between the parties and the placement of the ultimate intrinsic loss or responsibility upon the party who furnishes and uses the defective equipment or material that causes such an injury. Any contrary result would be both unjust and inequitable.

This is particularly true in many cases where the injured

party is an employee of the independent contractor supplying the defective equipment or material causing injuries aboard a vessel. The employer in such cases is immune from direct liability to its employee for damages by reason of the provisions of the Longshoremen's and Harbor Workers' Compensation Act,[2] which limit the employer's obligation to the providing of compensation and medical benefits.

III.

ARGUMENT

PROOF OF NEGLIGENCE IS NOT REQUIRED IN IMPLIED WARRANTY CASES

A. Discussion of Effect of Other Recent Decisions Involving Implied Warranty in Shipowners' Actions for Indemnity.

In 1958, the Court of Appeals for the Second Circuit decided *Booth SS Co. v. Meier & Oelhaf Co.*, 262 F.2d 310. An independent ship repair company contracted to replace defective cylinder liners in a vessel's diesel engine. During the removal of the cylinder liners, a wire strap parted, permitting a strongback to fall and injure an employee of the ship repair company. The evidence at the trial disclosed that the accident was not caused by the negligence of any of the parties but resulted solely from a *latent defect* in the wire strap. The trial court dismissed the shipowner's claim for indemnity against the ship repair company, holding that, failing proof of negligence, the shipowner could not recover from the repair company. In reversing the trial court, the Court of Appeals held that, where the contractor undertook to do the work of repair on the vessel's engines and supplied the equip-

[2] Title 33 U.S. Code §§ 901-950.

ment which failed in the course of the use for which it was supplied, this failure constituted a breach of the contractor's implied warranty of workmanlike service described by this Court in *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124 (1956). The Court of Appeals therefore held that the shipowner could recover full indemnity without proving negligence of the ship repair company.

This decision stood unchallenged until, in the instant case, the Court of Appeals for the Ninth Circuit, by a divided panel of the court (R. 43-64),[3] specifically rejected the holding in *Booth* and held that the warranty of workmanlike service could not be breached without some negligence on the part of the independent contractor. In a strong dissent (R. 54), Judge Jertberg quoted extensively from, and would have followed, the unanimous decision in the *Booth* case and the reasoning of this Court in the *Ryan* case.

In both *Booth* and the instant case, the appellate courts conceded that, as of the time of their respective decisions, there were no other cases directly in point.

Most recently, however, this Court, in *Reed v. S.S. YAKA*, 373 U.S. 410 (1963), spoke unequivocally on the issue. The trial court had found that the sole cause of injury to plaintiff, a longshoreman, was a *latent defect* in a pallet supplied by his employer, who was also the bareboat charterer of the vessel. In reversing the holding of the Court of Appeals that plaintiff's sole remedy was under the Longshoremen's and Harbor Workers' Compensation Act, this Court first noted at 373 U.S. 410,

[3] 310 F.2d 491.

"The district judge found that at the time of the injury petitioner was in the ship standing on a stack of rectangular, wooden pallets used in loading the vessel and that the sole cause of the injury was a latent defect in one of the planks of a pallet, which caused it to break."

Then at 414:

"Thus, there can be no doubt that, if the petitioner here had been employed to do this particular work by an independent stevedoring company rather than directly by the owner, he could have recovered damages for his injury from the owner who could have then under *Ryan* shifted the burden of the recovery to petitioner's stevedoring employer."

The Court further noted:

"In making this argument, Pan-Atlantic has not and could not point to any economic difference between giving relief in this case, where the owner acted as his own stevedore, and in one in which the owner hires an independent company. In either case, under *Ryan*, the burden ultimately falls on the company whose default caused the injury."

The Court of Appeals' decision in the instant case predates this Court's decision in *Reed* and is the first attempt to limit a stevedore's implied warranty of workmanlike service by requiring a showing of negligence to constitute a breach of the warranty. As noted in Judge Jertberg's dissent, none of the prior Supreme Court cases "exclude the existence of liability without fault as an element of the warranty of workmanlike service under the facts of this case." 310 F.2d at 491 (R. 61).

The decision under review is based on definitions of the word "workmanlike," which the Court of Appeals equated to all words which connote a standard of skill

similar to that associated with the reasonable man test for negligence.

The Court below has apparently confused the *nature* of the stevedore's duty with the *standard* to be observed under that duty. A comparison of the stevedore's warranty with the shipowner's warranty of seaworthiness is illuminating and relevant for the two are "corollary" doctrines. *De Gioia v. United States Lines Co.*, 304 F.2d 421 (CA 2d, 1962).

In *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960), it was contended that a transitory condition, of which the shipowner had no knowledge, did not make a vessel unseaworthy. This Court rejected the contention upon an analysis of the nature of the duty and the standard to be applied thereunder. In discussing the *Sieracki* case, this Court state., 362 U.S. at 549:

> "The character of the duty, said the Court is 'absolute.'"

Later in the opinion, the Court discussed the standard under that duty and said at 550:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suited for her intended service."

This characterization is equally applicable to the corollary doctrine of the implied warranty of workmanlike service, i.e., the stevedore's duty is absolute and the

standard is that of reasonable fitness for the intended purpose. Thus, as the shipowner in *Alaska SS Co. v. Petterson, supra*, was held absolutely liable because certain stevedore gear or equipment was not reasonably fit, so too should the stevedore be absolutely liable in indemnity since its obligation is co-extensive with that of the shipowner with respect to the stevedore's own equipment.

B. History and Development of Law Relating to Manufacturer's Warranty of Products.

In the case of *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*,[4] this Court first described in broad outline the shipowner's right to recover full indemnity on the theory of breach of implied warranty. In the process, it likened the stevedore's warranty of workmanlike service to a manufacturer's warranty of its product, stating at pages 133-134:

> "This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. *It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.* The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service." (Emphasis added)

Later, in describing the stevedore's implied warranty, this analogy has been reaffirmed several times.[5]

---

[4] 350 U.S. 124 (1956).

[5] *Crumady v. The J. H. Fisser*, 358 U.S. 423, 428-429 (1959); *Waterman SS Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421, 424 (1960); *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 358, Note 1 (1962).

This Court has also pointed out that in the area of contractual indemnity, "application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate."[6]

An analysis of the law concerning a manufacturer's warranty of the fitness of its product establishes that one of the earliest exceptions recognized to the rule of *caveat emptor* was in the situation where the manufacturer had knowledge of the specific use to which its product was to be put. Under such circumstances, the manufacturer was held to have warranted the fitness of his manufactured product and was responsible even for latent defects.[7]

In *Tennessee River, etc., Co. v. Reeds, Id.*, a cast iron piston head had been ordered from the defendant manufacturer to replace a broken one which the manufacturer had made. The new piston head was apparently perfect, but in about two months it broke and the casting was later discovered to have contained blowholes which could not have been detected by observation or test. The trial court instructed the jury on the theory of due care owed by the manufacturer. In its opinion, the Supreme Court of the State of Tennessee stated at page 390:

> "This charge is erroneous. It assumes the nonliability of a manufacturer for latent defects, if proper tests had been applied to the discovery of such defects by him, and they had not been found. This . . . is not the rule as applied to the manufacturer who makes and sells to a purchaser machinery for a special purpose. In that case the manufacturer warrants against

[6] *Weyerhaeuser SS Co. v. Nacirema Operating Co.*, 355 U.S. 563, 569 (1958).

[7] *Randall v. Newsom*, 2 Q.B.D. 102 (1877); *Rodgers v. Niles*, 78 Am. Dec. 290, 294, 295 (Ohio, 1860); *Tennessee River, etc., Co. v. Reeds*, 37 S.W. 389 (Tenn., 1896).

> latent defects that the machinery is reasonably fit for the use to which it is to be applied. He does not warrant (in the absence of express contract) that it is perfect, or the best for that purpose, but only that it is reasonably fit and proper for the use designed."

The implied warranty of fitness of a product for specific use as developed by the common law was later adopted into Section 15 of the Uniform Sales Act, but the warranty is not confined solely to sales transactions.[8] As the confines of warranty liability continued to expand, it was pointed out by one commentator as early as 1951 that:

> "We are all used to the fact that implied warranties of fitness have for some time involved absolute liability without fault between persons in direct contractual relationships, although we might not have thought of it as such."
>
> Gregory, *Trespass to Negligence to Absolute Liability*, 37 Virginia Law Review 359, 384.

By 1955, the most prominent authority in the field of tort law stated that courts had established that a breach of warranty action gave rise to strict liability which was not dependent upon any knowledge of defects on the part of a seller, or upon proof of negligence. Prosser on Torts (2d Ed. 1955) § 83.—*Suppliers of Chattels*, page 494.

The application of strict liability in warranty actions has accelerated as our economic structure continues to grow more complex and the accident toll of modern life continues to increase. Textwriters and commentators agree that it is now well settled that concepts of negligence and

[8] Annotation at 68 A.L.R. 2d 850, 854; *Eastern Motor Express, Inc., v. A. Maschmeijer, Jr., Inc.*, 247 F.2d 826 (CA 2d, 1957); *Aced v. Hobbs-Sesack Plumbing Co.*, 360 P.2d 897 (Cal., 1961); *Greenman v. Yuba Power Products Co.*, 377 P.2d 897 (Cal. 1962).

fault as defined by negligence standards have no place in such suits.[9]

Currently, the overwhelming weight of judicial opinion makes it clear that proof of negligence is unnecessary to establish liability for breach of the manufacturer's implied warranty. Illustrative of the products, equipment or material where such rule has been heretofore applied in numerous jurisdictions are the following cases:

CA 2 1958	*Booth SS Co. v. Meier & Oelhaf Co.*, 262 F.2d 310	Wire strap
CA 6 1962	*Hessler v. Hillwood Manufacturing Co.*, 302 F.2d 61	Concrete nail
CA 6 1960	*Hansen v. Firestone Tire & Rubber Co.*, 276 F.2d 254	Tire
D. Maine 1960	*In re Belle-Moc, Inc.*, 182 F. Supp. 429	Shoe lasts
D. Colo. 1954	*Senter v. B. F. Goodrich Co.*, 127 F. Supp. 705	Tire
Cal. 1962	*Greenman v. Yuba Power Product, Inc.*, 377 P.2d 897	Home power tool
Cal. 1960	*Gottsdanker v. Cutter Laboratories*, 182 Cal. App.2d 602	Polio vaccine
Cal. 1960	*Peterson v. Lamb Rubber Co.*, 353 P.2d 575	Grinding wheel
Florida 1963	*Green v. American Tobacco Co.*, 154 So.2d 169	Cigarettes
Iowa 1961	*State Farm Mutual Automobile Ins. Co. v. Anderson-Weber, Inc.*, 110 N.W.2d 449	Automobile wiring

[9] See: James, *Products Liability—Implied Warranties*, 34 Texas Law Review 192 (1955); Annotations in 78 A.L.R.2d 460, 475, 491, 493 and 79 A.L.R.2d 431, 439; Keeton, *Products Liability —Current Developments*, 40 Texas Law Review 193 (1961); Roberts, *Implied Warranties—The Privity Rule and Strict Liability*, 27 Missouri Law Review 194 (1962); 1 Hursh, *American Law of Products Liability*, § 3.1, pages 407, 408 (1961).

Kansas 1921	*American Tank Co. v. Revert Oil Co.* 196 Pac. 1111	Oil tank
Maine 1960	*Hadley v. Hillcrest Dairy, Inc.*, 171 N.E.2d. 293	Milk bottle
Mich. 1961	*Manzoni v. Detroit Coca-Cola Bottling Co.*, 109 N.W.2d 918, 920, 922	Coca Cola
Nebr. 1957	*Brown v. Globe Laboratories*, 84 N.W.2d 151	Sheep bacterin
New Jer. 1960	*Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69	Automobile steering
New York 1963	*Goldberg v. Kollsman Instrument Corp.*, *et al.*, 240 N.Y.S.2d 592	Airplane
Ohio 1951	*Di Vello v. Gardner Machine Co.*; 102 N.E.2d 289	Grinding wheel
Penn. 1959	*Jarnot v. Ford Motor Co.*, 156 A.2d 569	Truck steering
Texas 1942	*Jacob E. Decker v. Capps*, 164 S.W.2d 828	Sausage
Vermont 1953	*Green Mountain Mushroom Co. v. Brown*, 95 A.2d 678, 681	Roofing cement

Some courts have expressed the principle in different terms by holding that evidence of lack of negligence is completely immaterial for defense purposes.[10]

One leading text on the subject has recently pinpointed the question here involved and has stated the rule as follows:

"§ 16.01 Warranty and Negligence Distinguished

"[1] In general, the liability in negligence of a manufacturer or other supplier for damage caused

[10] *Rasmus v. A. O. Smith Corp.*, 158 F. Supp. 70 (N.D. Iowa, 1958); *Keyser v. O'Meara*, 165 Atl. 793 (Conn., 1933); *Ver Steegh v. Flaugh*, 103 N.W.2d 718 (Iowa, 1960); *Simmons v. Wichita Coca Cola Bottling Co.*, 309 P.2d 633 (Kan., 1957); *Snead v. Waite*, 208 S.W.2d 749 (Ky., 1948); *Gilbert v. John Gendusa Bakery, Inc.*, 144 So.2d 760 (La., 1962); *Lundquist v. Coca Cola Bottling, Inc.*, 254 P.2d 488 (Wash., 1953).

by his product is based on the supplier's failure to exercise reasonable care. Hence, negligence is a tort concept based on fault.

"Although the courts are occasionally confused about the matter, warranty, on the other hand, is not a concept based on fault or on the failure to exercise reasonable care. But this does *not* mean that warranty is necessarily contractual or nontortious in nature. Liability in warranty arises where damage is caused by the failure of a product to measure up to express or implied representations on the part of the manufacturer or other supplier. Accordingly, an injured person is not required to prove negligence in a warranty-products liability case. Similarly, evidence offered *solely* for the purpose of showing lack of negligence in manufacture is inadmissible in a warranty action because liability is imposed in such actions notwithstanding the exercise of due care. In short, liability in warranty is strict if a breach thereof is proved."

1 Frumer & Friedman, *Products Liability*, (1961) § 16.01 [1] pp. 358, 360.

Just as the case of *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (Mass. 1916), was a landmark in the area of manufacturers' liability for negligence, the case of *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J., 1960), is regarded as the leading case in the area of manufacturers' liability for breach of implied warranty. In *Henningsen, supra*, the court was called upon to decide whether the purchaser of a new automobile could recover on the theory of implied warranty for injuries sustained by his wife when the car suddenly went out of control and crashed from some undetermined failure of its steering or other mechanical parts. The contract of sale had certain limited express warranties of the manufacturer and dealer and undertook to disclaim any further implied

warranty or liability. There was no proof of negligence of the manufacturer or dealer. In an action against both, the court, after an exhaustive review and analysis of the decisions relating to implied warranties, held that the purchaser and his wife could recover against both manufacturer and dealer, regardless of any lack of privity. Thus, while the courts have been slower to abolish the requirement of privity in the area of implied warranty, the result is now the same as in the field of negligence.[11]

In the instant case, the petitioner is in direct privity with the respondent stevedore and is entitled to recover full indemnity on the ground that the stevedore's implied warranty of the fitness of its equipment and material is co-extensive with the shipowner's warranty of seaworthiness.[12] It is an absolute duty to furnish equipment which is reasonably fit for the intended usage. *Mitchell v. Trawler Racer*, 362 U.S. 539 (1960).

INDEPENDENT CONTRACTOR SHOULD BEAR ULTIMATE RISK OF LOSS. OPPORTUNITY TO INSPECT AND EXPERTISE

Despite the statement in the majority opinion of the Court below to the contrary, there are strong policy reasons for imposing indemnity liability on a stevedore when a latent defect in equipment or material it has supplied and used aboard a vessel has cast a shipowner in damages. Under *Alaska SS Co. v. Petterson, supra*, note 1, the protection of the warranty of seaworthiness was extended to

[11] See: Prosser, *The Assault Upon the Citadel*, 69 Yale Law Journal 1099 (1960); Roberts, *Implied Warranties—The Privity Rule and Strict Liability*, 27 Missouri Law Review 194 (1962).

[12] See: *Shamrock Towing Co. v. Fichter Steel Corp.*, 155 F.2d 69 (CA 2d, 1946); *Mickle v. M/V H. W. Schulte*, 188 F. Supp. 77 (N.D. Calif., 1960).

cover defective gear or equipment brought aboard by an independent contractor. Now, under *Reed v. SS YAKA*, 373 U.S. 410, "the burden ultimately falls on the company whose default caused the injury." *Id.* at 414. The soundness of this policy was set forth in detail in *Booth SS Co. v. Meier & Oelhaf, supra*, with respect to equipment supplied and used exclusively by an independent contractor. The Court stated at 314:

> "In such circumstances the hirer defers to the special qualifications of the contractor in both the selection and use of the equipment. Relying on the supplier's control of the work and with confidence in the supplier's expert knowledge and competence, he makes at most only a routine inspection of the equipment employed.
>
> "Such latent defects in wire as are undetectable on visual inspection may result from improper manufacture or from fatigue resulting from use over a period of time. They may perhaps be discovered by subjecting the equipment to appropriate tests with safety factors in excess of the contemplated undertaking. Furthermore, it is the supplier and not the shipowner who knows the actual history of prior use of the equipment. He alone is in the position to establish such retirement schedules or periodic retests as will best prevent the development of visually undetectable flaws."

As Judge Jertberg pointed out in his dissenting opinion in the Court below at 310 F.2d 491 (R. 60, 61):

> "Since the loss must be borne by either one or the other, it is not unfair that such loss be ultimately borne by the one best able to eliminate the hazard, to wit, the owner of the defective gear, or equipment who supplied it and whose use and control over it was exclusive."

To the same effect was the statement of the Court in

De Gioia v. United States Lines Co., 304 F.2d 421, 426 (CA 2d, 1962):

> "The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved."

The fairness of such a policy is self-evident. There is neither precedent nor valid argument against it and to abort the logical development of the implied warranty of workmanlike service in this case would be unjust and without reason. Moreover, to compensate the injured longshoreman is only half the battle. The ultimate goal, prevention of accidents, can best be achieved when responsibility for the condition of equipment or material is borne by the party who supplies and uses it.

IV.

CONCLUSION

Sound and logical application of the law of implied warranty does not require proof of negligence to entitle a shipowner to recover full indemnity from an independent contractor who supplies latently defective equipment and materials. This is entirely consistent and in harmony with this Court's several recent expressions as to the scope and extent of the shipowner-operator's right to recovery of indemnity. It is also consistent with the proper allocation of risks as between two otherwise non-negligent parties since it places the ultimate intrinsic loss on the independent contractor who furnishes and uses the equipment or material and who would have the best

opportunity to test and replace any such product that might fail while being used in a normal fashion by the contractor aboard a vessel.

For the foregoing reasons, *amici curiae* respectfully submit that the decision of the Court of Appeals should be reversed and that petitioner should be held entitled to recover full indemnity from respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CHARLES B. HOWARD, one of counsel for American Merchant Marine Institute, Inc., Pacific American Steamship Association and Lake Carriers' Association, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 19th day of August, 1963, I served copies of the foregoing Brief on counsel for all parties of record by mailing copies of said Brief attached to copies of Motion for Leave to File *Amici Curiae* Brief, in sealed envelopes, deposited in the U. S. mail at Seattle, Washington, with postage prepaid and addressed as follows:

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Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 82

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE, PETITIONER

v.

OREGON STEVEDORING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the district court (R. 21–23) is unreported. The majority and dissenting opinions of the Court of Appeals for the Ninth Circuit (R. 43–54; 54–64) are reported at 310 F. 2d 481.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1962 (R. 64–65). A timely petition for rehearing was denied (one judge dissenting) on December 5, 1962 (R. 65). The petition for a writ of certiorari was filed on February 27, 1963, and granted on April 15, 1963 (R. 66; 372 U.S. 963). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a shipowner may recover indemnity from a stevedore for breach of an implied warranty of the fitness of its equipment or for breach of its implied warranty of workmanlike performance where—

(a) the stevedore, without fault, has supplied defective equipment which injures one of its own employees during the course of the stevedoring operation, and

(b) the stevedore's employee has obtained a recovery from the shipowner on the basis of the unseaworthiness of the equipment supplied by the stevedore.

STATEMENT

On November 19, 1958, the respondent stevedoring company, pursuant to a written contract with petitioner steamship company, was engaged in performing stevedoring services on petitioner's vessel, the MS ANTONIO PACINOTTI, in the harbor of Portland, Oregon. In the course of rigging a Seattle hatch tent over an open hatch, a longshoreman named William Griffith, one of respondent's employees, was injured when a tent rope he was pulling snapped because of a latent defect. Griffith was thrown to the deck and sustained personal injuries.

The tent and the defective rope involved in the mishap were owned by respondent and brought on board pursuant to its contractual obligation to supply "all ordinary gear" necessary for the performance of expert stevedoring services on its customer's vessels, as well as all necessary labor and supervision (R. 23a). Under its contract with petitioner, respondent ex-

pressly agreed to be "responsible * * * for injury to or death of any person caused by its negligence" (R. 23a), while petitioner shouldered responsibility for injury or death arising through its negligence or "by reason of the failure of ship's gear and/or equipment" (R. 23b).

The injured longshoreman sued petitioner in the Oregon state courts for negligence and unseaworthiness (R. 24). The case was submitted to a jury on both issues; a general verdict was returned in favor of Griffith; and he recovered a judgment in the amount of $5,953.52 (*ibid.*).

Petitioner then brought suit in the United States District Court for the District of Oregon seeking to recover indemnity from the respondent stevedore for the amount of the judgment. The court found that respondent had overcome "any presumption or inference of negligence" (R. 22), and held that petitioner could not recover for breach of an implied warranty of workmanlike service because the contractual provision expressly imposing liability on respondent for negligence negated any such warranty (R. 23).

The court of appeals (Circuit Judge Jertberg dissenting) affirmed. While expressing no view as to the correctness of the district court's reasoning, the majority held that a stevedoring company is not liable for breach of the warranty of workmanlike service in the absence of negligence (R. 43–65).

INTEREST OF THE UNITED STATES

The scope of the stevedore's liability for breach of its warranty of workmanlike service—a liability

first recognized by this Court in *Ryan Stevedoring Co. Inc.* v. *Pan-Atlantic S.S. Co.*, 350 U.S. 124—has since been the subject of a number of decisions. See *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563; *Crumady* v. *The J. H. Fisser*, 358 U.S. 423; *Waterman Steamship Corp.* v. *Dugan & McNamara*, 364 U.S. 421; *A. & G. Stevedores* v. *Ellerman Lines, Ltd.*, 369 U.S. 355. As the world's largest shipowner and one of the largest customers of contracting stevedores, repair yards, and other maritime contractors, the United States participated as *amicus curiae* in *Ryan* and in all of the subsequent cases cited above except *A. & G. Stevedores*. Here, again, the United States has a vital interest. If the decision below stands, the government, as a self-insured shipowner, will sustain numerous unrecoverable losses whenever claims are asserted against it by longshoremen injured as a result of defective gear supplied by stevedores and other contractors. Accordingly, we believe it appropriate to file this brief setting forth our views as to the nature of the shipowner's contractual right to reimbursement and the scope of the stevedoring contractor's warranty.

ARGUMENT

INTRODUCTION AND SUMMARY

This is an action by a shipowner against a contracting stevedore to recover damages for breach of the stevedore's implied warranty of workmanlike service. The stevedore, a shoreside specialist in shiploading, was hired to load and unload its customer's vessels and to supply "all ordinary gear" necessary for the stevedoring operation. In discharging this obligation,

the stevedore brought on board a latently defective rope which broke, causing injury to one of its own employees. The injured longshoreman recovered damages from the shipowner for breach of its implied warranty of the "seaworthiness" of the gear. The question presented is whether the shipowner can secure indemnity from the stevedore without showing that the stevedore was negligent.

The legal principles which form the background of the present controversy are well settled. A shipowner owes an absolute, non-delegable duty to provide a seaworthy vessel and fit or "seaworthy" equipment for a longshoreman who, in the employ of a contracting stevedore, boards the vessel to perform the loading or unloading portion of "the ship's work" on behalf of the owner. *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539; *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 95. If the owner engages an expert stevedore to do that work and supply the equipment necessary for its accomplishment, he must still answer to the longshoreman if the gear proves unseaworthy, regardless of whether the stevedore is negligent in furnishing it. *Alaska S.S. Corp.* v. *Petterson*, 347 U.S. 396, affirming 205 F. 2d 478 (C.A. 9). While the owner cannot recover contribution from a stevedore as a joint tortfeasor, *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, he may claim indemnity on contractual grounds for any liability he incurs as a result of the stevedore's inadequate performance. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co.*, 350 U.S. 124. The stevedore's contractual liability,

as the Court has spelled out in several cases, is founded on an implied warranty of "workmanlike service," under which the stevedore undertakes to perform the obligations of the contract with "reasonable safety." *Ryan Stevedoring Co., supra,* p. 5; *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563, 567; *Crumady* v. *The J.H. Fisser*, 358 U.S. 423, 427–428; *Waterman Steamship Corp.* v. *Dugan & McNamara*, 364 U.S. 421, 423–424. In each of those cases, it appeared that the longshoreman's injury resulted from the stevedore's negligence in handling the cargo or in using equipment. The precise question here is whether, either as part of the warranty of workmanlike service or in addition to it, there is an implied warranty that the equipment furnished by the stevedore is reasonably fit for its purpose and free of all defects, including those which would not be discovered in the exercise of ordinary care.

Since the stevedore's liability is grounded in contract, rather than in tort, it is plain that the absence of negligence, as such, is not a defense. While the court below acknowledged the contractual basis of the liability, it concluded nonetheless that the standard of performance required by the warranty was identical to the standard of ordinary care imposed by the law of torts. We believe, on the contrary, that the warranty holds the stevedore to strict accountability for any defect, latent or otherwise, which renders his equipment "unseaworthy."

In support of this conclusion, we urge (1) that the stevedore's strict responsibility for the seaworthiness of the equipment he brings on board is but a special

application of the implied warranty of fitness which arises whenever chattels are supplied for a particular purpose to one who relies on the supplier's skill or judgment; (2) that the protective policy which gives rise to the shipowner's absolute duty of seaworthiness demands that the burden of liability for non-negligent shipboard injury be shifted from the owner to the stevedore in circumstances where it is he, rather than the owner, who is in a position to minimize the risk of such injury; and (3) that the prior decisions of this Court implicitly or explicitly endorse the view that, as part of his implied warranty of workmanlike service, the stevedore warrants the equipment he supplies against latent defects.

We take no position as to the subsidiary question whether the contractor's implied warranty to its customer is negated by the terms of the particular contract involved in this case. That issue was not considered by the court of appeals and is not, we believe, fairly comprehended within the questions presented by the petition for certiorari. In any event, the interest of the United States is confined to the basic issue, *i.e.*, the scope of the stevedore's implied warranty in the absence of a contractual disclaimer.

THE STEVEDORE'S WARRANTY MAKES HIM STRICTLY ACCOUNTABLE TO THE SHIPOWNER FOR ANY DEFECT, LATENT OR OTHERWISE, WHICH RENDERS HIS EQUIPMENT UNSEAWORTHY

1. That the stevedore is strictly accountable for latent defects in the equipment he supplies pursuant

to a contract is but a specific application of a basic common law principle. It is well established that a retailer or manufacturer who sells goods for a known purpose to a buyer who relies on his skill or judgment makes an implied warranty that those goods are reasonably fit for that purpose.[1] The warranty of fitness, moreover, is not confined to the law of sales. It arises also in the case of leases and other bailments—indeed, whenever goods are supplied under a contract to one who places reliance upon the supplier's proficiency and prudence.[2] Thus, a shipowner who supplies equipment to a stevedore for use in unloading the ship is liable, on an implied warrant of fitness, to indemnify the stevedore if defects in the equipment cause injury to one of its longshoremen employees. *Mowbray* v. *Merryweather* [1895] 2 Q.B. 640; *Hagans* v. *Farrell Lines*, 237 F. 2d 477 (C.A. 3). One who ships goods by common carrier impliedly warrants that both the goods (*Bamfield* v.

[1] The warranty applied is, of course, that stated in Section 15(1) of the Uniform Sales Act, 1 Uniform Laws Annotated (1950 ed.) 15 which provides:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

Section 2-315 of the Uniform Commercial Code (U.L.A.) is, in regard to the implied warranty of reasonable fitness, not materially different from the Sales Act.

[2] See, generally, Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 Col. L. Rev. 653, 656 (fns. 18-24); 1 Frumer and Friedman, *Products Liability*, § 19.02; 68 A.L.R. 2d 850, 855.

Goole and Sheffield Transport Company, Ltd. [1910] 2 K.B. 94) and the containers in which the goods are shipped (*Eastern Motor Express* v. *A. Maschmeijer, Jr., Inc.*, 247 F. 2d 826 (C.A. 2), certiorari denied, 355 U.S. 959; *Vogan & Co.* v. *Oulton* [1899] 81 L.T.N.S. 435, 16 Times Law Reports 37 (C.A.)) are reasonably fit for carriage. One who hires out a crane for use in lifting heavy pipes impliedly warrants its suitability for that purpose and may not recover the stipulated rental if the boom breaks in the course of hoisting the pipes. *Hoisting Engine Sales Company* v. *Hart*, 237 N.Y. 30, 36, 142 N.E. 342. A roller-skating rink warrants the fitness of the skates it rents and is answerable in damages to a customer who is injured because of a defective skate. *Covello* v. *New York*, 17 Misc. 2d 637, 187 N.Y.S. 2d 396.

In the case of sales, it is generally agreed that the implied warranty of fitness is absolute and is not avoided by the fact that the seller is unable, in the exercise of ordinary care, to discover the injury-causing defect.[1] Indeed, it is proper to exclude any evidence offered by the manufacturer to show that due care was used in the manufacturing process. *Hessler* v. *Hillwood Mfg. Company*, 302 F. 2d 61, 63 (C.A. 6); *Simmons* v. *Wichita Coca-Cola Bottling Co.*, 181 Kan.

[1] See, *e.g.*, *Jelleff* v. *Braden*, 233 F. 2d 671 (C.A.D.C.); *American Tank Co.* v. *Revert Oil Co.*, 108 Kan. 690, 694, 196 P. 1111, 1113; *Henningsen* v. *Bloomfield Motors*, 32 N.J. 358, 372, 161 A. 2d 69, 77; *Blessington* v. *McCrory Stores Corp.*, 305 N.Y. 140, 147, 111 N.E. 2d 421, 423; *Canadian Fire Insurance Co.* v. *Wild*, 81 Ariz. 252, 254, 304 P. 2d 390, 391. See generally Williston on *Sales*, § 237 (Rev. ed. 1948 and Supp. 1963); 1 Frumer and Friedman, *Products Liability*, p. 360.

35, 39, 309 P. 2d 633, 636. Although in the non-sale cases there is as yet no clear consensus among the courts,[7] the trend of decision is in the same direction.[8] The leading commentators have consistently taken the position that the liability of suppliers should be

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[7] See, generally, Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 Col. L. Rev. 653, 655-660, particularly fn. 24, p. 658; 1 Frumer and Friedman, *Products Liability*, § 19.02.

[8] In some instances, the courts have explicitly endorsed the principle that the supplier's warranty of fitness is absolute. *Booth Steamship Co.* v. *Meier & Oelhaf Co.*, 262 F. 2d 310, 314 (C.A. 2); *Eastern Motor Express* v. *A. Maschneijer, Jr. Inc.*, 247 F. 2d 826, 828 (C.A. 2); *Shamrock Towing Co.* v. *Fichter Steel Corp.*, 155 F. 2d 69, 72 (C.A. 2) (dictum). In other cases, that principle is implicit, the court finding a breach of the warranty of fitness without regard, apparently, to whether the supplier was negligent. *Gray Line Co.* v. *Goodyear Tire & Rubber Co.*, 280 F. 2d 294, 298 (C.A. 9) (semble); *Matter of Casualty Co.*, 250 N.Y. 410, 165 N.E. 829; *Hoisting Engine Sales Company* v. *Hart*, 237 N.Y. 30, 36; *Motion Pictures for T.V.* v. *North Dakota Broadcasting Co.*, 87 N.W. 2d 731, 63 A.L.R. 2d 645; *Hilton* v. *Wagner*, 10 Tenn. App. 173, 176; *Marcos* v. *Texas Co.*, 75 Ariz. 45, 46, 48, 251 P. 2d 647; *Schmidt-Hitchcock Contractors* v. *Dunning*, 38 Ariz. 360, 368, 300 Pac. 183; *General Talking Pictures Corp.* v. *Shea*, 187 Ark. 568, 576, 61 S.W. 2d 430; *Famous Players Film Co.* v. *Salomon*, 70 N.H. 120, 121 (applying New York law), 106 Atl. 282; *Gambino* v. *John Lucas & Co.*, 263 App. Div. 1054, 34 N.Y.S. 2d 383; *Standard Oil Co.* v. *Boyle*, 231 App. Div. 101, 102, 246 N.Y. Supp. 142; *Thompson Spot Welder Co.* v. *Dickelman Mfg. Co.*, 15 Ohio App. 270, 274; *Milwaukee Tank Works* v. *Metals Coating Co.*, 196 Wis. 191, 193, 218 N.W. 835; *Covello* v. *New York*, 17 Misc. 2d 637, 187 N.Y.S. 2d 396.

The draftsman of the Uniform Commercial, aware of the developing case law with respect to the nature of the supplier's warranties, stated in a comment (Anderson's Uniform Commercial Code, Section 2-313:1, comment 2 (1961 ed.)):

"Although this section is limited in its scope and direct pur-

co-extensive with that imposed by the law of sales since the considerations which give rise to the implied warranty of fitness, and which justify making that warranty absolute, do not in any way depend upon the passage of title. 4 Williston on *Contracts*, § 1041 (1936 ed.); 2 Harper and James, *The Law of Torts*, § 28.19 (1956); Prosser, on *Torts*, 496 (2d ed. 1955); Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 Col. L. Rev. 653, 667–674; see, also, 1 Frumer and Friedman, *Products Liability*, § 19.02. The supplier, like the manufacturer and the retailer, derives profit from the bailment or lease of his equipment, and, although he is unable to prevent defects from arising in the course of manufacture, his expert knowledge of the characteristics and history of the equipment surely makes him better able than the user to detect and guard against defects. Accordingly, "[i]t is * * * not less reasonable as an incident of his contract to charge him with the duty of making tests, the omission of which would not constitute negligence, than it is to charge the manufacturer or retailer with a similar responsibility." *Booth Steamship Co.* v. *Meier & Oelhaf Co.*, 262 F. 2d 310, 314 (C.A. 2).

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pose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. * * *"

It follows from these principles that a stevedore who sells or leases equipment to a shipowner for use by members of the crew in loading the ship would be strictly liable to the owner for latent defects. There is no reason for a different result here merely because the expert contractor, in addition to providing the gear, also undertook to do the stevedoring work. On the contrary, there is all the more reason to impose liability. The shipowner who performs the stevedoring operation himself has some opportunity to observe the equipment in use and to inspect for latent defects. But where, as here, the equipment remains under the exclusive supervision and control of the stevedore, the owner's reliance upon the stevedore's caution and judgment is complete. It would be anomalous indeed if the owner could obtain indemnification from the supplying stevedore in a case where a member of the crew sustains injury while using latently defective equipment operated by the owner himself, but could not hold the stevedore to account in a case where the latter's own longshoreman employee is injured because of defective equipment exclusively controlled by the stevedore.

2. The policy considerations which favor the imposition of strict liability upon the supplier are particularly compelling in the field of maritime law. This Court has noted time and again that the shipowner's obligation of seaworthiness is rooted in the hazards of the ship's work and in the "humanitarian policy" of safeguarding seamen and longshoremen from the perils of unseaworthiness which they are helpless to ward off. *Reed* v. *The Yaka*, 373 U.S. 410;

Seas Shipping Co. v. *Sieracki*, 328 U.S. 85, 93–95. In part, that policy is served by providing compensation to the injured employee—who, unaided, cannot shoulder the costly disability—at the expense of the shipowner, who can distribute the loss among the shipping community. *Seas Shipping Co.* v. *Sieracki, supra*, at 93. It is no less important, however, that the incidence of liability should fall ultimately upon the party who is best situated to adopt preventive measures. More fundamental than the provision of compensation is the maximum avoidance of injury.

We submit accordingly that, as a matter of policy, the economic consequences of non-negligent shipboard injury should be borne by the expert stevedore, rather than by his shipowner customer, in cases where the former has supplied unseaworthy equipment. The stevedore, not the owner, is the party who initially selects the gear and who, by making appropriate tests, can seek out flaws which might not present themselves to the naked eye. It is the stevedore, moreover, who knows the age of the equipment and the actual history of its use, and therefore is in a position to set up retirement schedules and conduct periodic retesting with a view to saving the gear from fatigue and overuse. *Booth Steamship Co., supra*, 262 F. 2d at 314–315. The considerations which led this Court to conclude in *Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85, that it would be unsound policy to enforce a contractual provision whereby a towboat exercising control of a towing operation shifted the liability for negligence to the inert tow or barge likewise support the conclusion that the incentive to take more-than-ordinary

measures of care should rest with the party in actual control. "The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved." *De Gioia* v. *United States Lines Co.*, 304 F. 2d 421, 425–426 (C.A. 2). In placing the burden of liability on the shipowner, who is powerless to minimize the risk, rather than upon the stevedore, who is not, the court below failed to give effect to this basic maritime policy.

It is no answer that the stevedore here was not found negligent. Where the flawed equipment is at all times within the exclusive control of the stevedore, the owner may be entirely dependent on the testimony of the stevedore's own employees, and will inevitably be hard put to show negligence even where it exists. More important, however, the stevedore may have satisfied the standard of ordinary care, yet still have failed to adopt measures, *e.g.*, special tests and inspections, which would have disclosed the defect. The rule promulgated by the decision below removes any economic incentive for the stevedore to take those precautions which, though they may not be required by the law of negligence, may nonetheless be necessary in order to assure the stevedore's employees a safe place to work.

3. The stevedore's strict responsibility for the seaworthiness of the equipment he brings on board his customer's vessel is closely related to, and may even

be part of, his warranty of workmanlike service. It is not surprising, therefore, that the decisions of this Court relating to that warranty foreshadow the result we urge here. Indeed, in *Reed* v. *The Yaka*, 373 U.S. 410, decided only last Term, the Court stated that a shipowner could recover over from a stevedore for breach of warranty even though the injury-causing defect was latent and the stevedore without fault. A longshoreman had been injured when one of the planks of a wooden pallet on which he was standing broke because of a hidden defect.[6] The Court held that the longshoreman's employer, which had chartered the ship and elected to do its own stevedoring work, could be held liable to the longshoreman for unseaworthiness despite the provisions of the Longshoremen's and Harbor Worker's Compensation Act which, on their face, make exclusive the employer's duty to pay compensation under the Act.[7] The Court justi-

[6] The district court found that the sole cause of the accident was the latent defect in the pallet; it did not find any negligence on the part of the stevedore. 183 F. Supp. 69, 71 (E.D. Pa.).

[7] The precise question before the Court in *The Yaka* was whether the injured longshoreman could proceed *in rem* against the vessel and recover for his injuries. The court of appeals, after concluding that the owner of the ship was absolved from liability since it had chartered the ship to the longshoreman-employer and that the longshoreman-employer was saved from liability by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, held that no libel *in rem* could be sustained against the ship since there was no underlying personal liability to support the *in rem* action. 307 F. 2d 203 (C.A. 3). This Court reversed, not reaching either the question whether an *in rem* libel against the ship is allowable in the absence of underlying personal liability or the question whether the owner of the ship was relieved from liability for unsea-

fied the imposition of that liability partly on the ground that the employer would have had to bear the same economic burden if it had been an independent stevedore hired by the shipowner, observing (p. 414):

> Thus, there can be no doubt that, if the petitioner here had been employed to do this particular work by an independent stevedoring company rather than directly by the owner, *he could have recovered damages for his injury from the owner who could have then under Ryan shifted the burden of the recovery to petitioner's stevedoring employer.* * * * [Emphasis added.]

Although that statement was not, perhaps, necessary to the decision, it was an important step in the Court's reasoning and was apparently concurred in by the two dissenting Justices (Mr. Justice Harlan and Mr. Justice Stewart).

Furthermore, the Court pointed out in *Ryan Stevedoring Co., Inc., supra,* 350 U.S. 124, 133–134, and repeated in both *Crumady, supra,* 358 U.S. 423, 428–429, and *Waterman S.S. Corp., supra,* 364 U.S. 421, 424, that the stevedore's warranty of workmanlike service is "comparable to a manufacturer's warranty of the soundness of its manufactured product"—a warranty which, as we have shown (*supra,* pp. 9–10) is absolute.

If, therefore, the stevedore's warranty is comparable to the manufacturer's, as this Court has repeatedly stated, it too must give rise to strict liability.

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worthiness when it chartered the ship. It was the view that the longshoreman could recover against his employer, and this was sufficient support for the *in rem* action. 373 U.S. at 415–16.

This conclusion is not impaired by the consideration that the stevedore's warranty has been described as one to perform contractual obligations to his customer "with reasonable safety" or "in a reasonably safe manner." See *Ryan Stevedoring Co., supra,* 350 U.S. at 130–134. That standard has nothing to do with the "reasonable man" test pertaining to negligence. The stevedore's duty is not to supply equipment which he "reasonably" believes to be safe, or which he has taken "reasonable" steps to make safe, but equipment which in fact is "reasonably" safe. It is not the degree of care, but the degree of safety, which is less than absolute. This distinction was clearly explained in *Mitchell* v. *Trawler Racer, Inc.,* 362 U.S. 539, 550, which described the shipowner's duty to provide a seaworthy vessel as follows:

> What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin* v. *Lykes Bros. S.S. Co.,* 348 U.S. 336.

By the same token, the stevedore's warranty of workmanlike service amounts to an undertaking not to create hazards which would render the ship unseaworthy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 82

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,
Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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CITATIONS

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the district court (R. 21-23) is unreported. The majority and dissenting opinions in the Court of Appeals for the Ninth Circuit (R. 43-54, 54-64) are reported in 310 F2d 481, 488; 1963 AMC 79, 89.

JURISDICTION

The judgment of the Court of Appeals was entered October 25, 1962 (R. 64-65). A timely petition for rehearing was denied, with dissent, on December 5, 1962 (R. 65). The petition for a writ of certiorari was filed February 27, 1963, and granted on April 15, 1963 (R. 66; 372 US 963). The jurisdiction of this Court is based on 28 USC § 1254 (1).

QUESTIONS PRESENTED

1. Does the implied warranty owed by a stevedore contractor to its shipowner customer[1] include a warranty that gear and equipment furnished and brought aboard the vessel for its own use shall be reasonably suitable for its intended use?

2. Is a shipowner entitled to indemnity against its stevedore contractor who, although not negligent, has brought aboard the vessel for use in the stevedoring operations equipment which is unsuitable because of latent defect, and thereby subjected the shipowner to liability for damages to the stevedore's longshore employee injured by the defective equipment?

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[1] *Ryan Stevedore Co.* v. *Pan-Atlantic S.S. Corp.*, 350 US 124; *Crumady* v. *The J. H. Fisser*, 358 U.S. 423; *Waterman S.S. Corp* v. *Dugan & McNamara*, 364 US 421.

STATEMENT OF THE CASE

On November 19, 1958, pursuant to a written contract between the parties, respondent Oregon Stevedoring Company was performing stevedoring services on petitioner's vessel, the Antonio Pacinotti, in the harbor of Portland, Oregon.

The stevedoring contract required the stevedore to furnish all labor and supervision and also "all ordinary gear for the performance of the services . . . and usual appliances used for stevedoring" (R. 23a). For use in the stevedoring operations, the stevedore furnished and brought aboard the vessel a tent to protect cargo from rain, with attached tie ropes. The tent and attached tie ropes were owned, supplied, rigged and at all times used under the exclusive supervision and control of the stevedore (R. 25).

During the work of rigging the tent, done by the stevedoring company as a part of its stevedoring services, while one Griffith, a longshoreman employee of the stevedoring company, was pulling on a tie-down rope, the rope broke, resulting in injury to Griffith. The rope broke because it was defective and unfit for the purpose intended (R. 25). The defect was not visible, but latent, and there was no proof of negligence on the part of the stevedoring company.

Griffith sued petitioner in the state court and recovered a judgment, which petitioner paid. Petitioner shipowner then brought suit for indemnity against respondent, the contracting stevedore, in the United States

District Court for the District of Oregon, in Admiralty, based upon the stevedoring contract, a maritime contract.[2]

The district court's findings of fact, summarized above, are set forth in full in the Record, pp. 23-26. Finding no negligence on the part of the stevedore, and construing the contract as relieving the stevedore from all liability except for negligence, the district court entered a decree dismissing the libel.

The Court of Appeals affirmed, by a two-judge decision, holding that the implied warranty owed by a stevedore to a shipowner is merely a warranty against negligence, and does not include a warranty that equipment furnished and brought aboard the vessel by the stevedore shall be suitable for the intended use. Judge Jertberg dissented, agreeing with the decision of the Court of Appeals for the Second Circuit, in *Booth S.S. Co.* v. *Meier & Oelhaf*, 262 F2d 310 (1958), that the contractor's implied warranty is breached by furnishing defective equipment regardless of negligence.

SUMMARY OF ARGUMENT

It is well established by this Court's prior decisions that the contracting stevedore owes to its shipowner customer an implied warranty to perform the stevedoring services in a workmanlike manner, and with competency and safety.[3] Contracting stevedores do not

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[2] *American Stevedores, Inc.* v. *Porello*, 330 US 446, 456.

[3] *Ryan Stevedore Co.* v. *Pan-Atlantic S.S. Corp.*, 350 US 124; and other cases cited in Note 1.

merely perform labor, but also supply and bring aboard the vessel various materials and equipment for their own use in the stevedoring operations. The shipowner is liable under its absolute warranty of seaworthiness to a longshoreman injured by unseaworthy equipment furnished and brought aboard by the stevedoring contractor.[4] Therefore, the shipowner must rely on the stevedore contractor to furnish equipment reasonably suitable and fit for the purpose intended. By furnishing defective equipment resulting in injury, the stevedore imposes a vicarious liability upon the shipowner. Therefore, the contracting stevedore should be held to an implied warranty that the equipment it furnishes will be suitable for the purpose intended.

Since the stevedore's liability for indemnity is based upon contractual warranty, proof of negligence is not required. The principles stated in *Ryan*, and other decisions of this Court considering the extent of the stevedore's warranty, establish that the stevedore owes to the shipowner a contractual warranty of suitability of equipment, and is liable to indemnify the shipowner against a foreseeable loss resulting from breach of such warranty.

The reasoning of this Court in the recent decision in *Reed* v. *The Yaka*[5] clearly establishes that the ultimate loss falls upon the independent contracting stevedore who furnishes latently defective equipment.

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[4] *Alaska S.S. Co. v. Petterson*, 347 US 396.

[5] 373 US 410, 10 L Ed 2d 448 (May 27, 1963).

This Court has repeatedly stated that the stevedore's warranty is "comparable to a manufacturer's warranty as to the soundness of its product." Therefore, the stevedore's warranty as to its equipment, like the manufacturer's as to its product, is absolute.

It is the stevedore who owns, furnishes and brings the equipment aboard the vessel, and has exclusive control over its use. The shipowner has no control over such equipment. The strong public policy to avoid or minimize the risk of injury to shipboard employees requires placing the ultimate loss upon the stevedore, who is in the best position to eliminate the hazards.

It is only fair to place the ultimate liability upon the stevedore contractor, who, by furnishing defective equipment, has visited a liability upon the shipowner.

ARGUMENT

Background and Circumstances of the Warranty

The shipowner owes to seamen, longshoremen, and others doing the traditional work of seamen, an absolute warranty of seaworthiness. *Seas Shipping Co.* v. *Sieracki*, 328 US 85. This warranty is absolute and does not depend upon negligence. The standard of seaworthiness is "reasonable fitness" and "reasonably suitable" for the intended purpose. *Mitchell* v. *Trawler Racer*, 362 US 539.

Shipowners engage contracting stevedores to perform the work of loading and unloading the vessels. It is now well settled that the stevedore contractor owes

to its shipowner customer an implied-in-fact warranty to perform the stevedoring work with competency and safety. Therefore, the stevedore contractor must indemnify the shipowner for damages the shipowner may be called upon to pay to a longshoreman injured as a result of the stevedore's failure to perform its services in a workmanlike manner.[6]

Stevedores do not merely perform labor aboard vessels,—they also bring aboard all sorts of gear and equipment, such as blocks, shackles, cables, slings, ropes, hatch tents, pallet boards, tractors, stowing winches, cargo hooks, dollies, or trucks, and other specialized gear for handling cargo.

In the present case the stevedore furnished a hatch tent, with appurtenant tie ropes, pursuant to its contractual obligation to "furnish all ordinary gear for the performance of the services . . . and usual appliances used for stevedoring" (R. 23a).

If the stevedore contractor furnishes unseaworthy equipment which results in injury to a longshoreman, the shipowner is thereby subjected to liability to the injured man under its absolute warranty of seaworthiness. In other words, the shipowner's liability under its warranty of seaworthiness applies even to defective equipment brought aboard by the independent contractor over which the shipowner has no control. *Alaska S.S. Co.* v. *Petterson*, 347 US 396; *Mitchell* v. *Trawler Racer*, *supra*, p. 549.

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[6] *Ryan Stevedore Co.* v. *Pan-Atlantic S.S. Corp.*, 350 US 124; *Crumady* v. *J. H. Fisser*, 358 US 423; *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 US 563.

The shipowner hires the contracting stevedore as a specialist, and relies upon the contractor's expertise.[7] Since the shipowner is held to warrant seaworthiness of equipment furnished by the stevedore, the shipowner must necessarily rely on the stevedore to furnish equipment that meets the standard of seaworthiness. As in the present case, the stevedore contractor normally owns the equipment, brings it aboard the vessel, and retains exclusive control over its use in the stevedoring operations (R. 25). The shipowner has no control over the equipment. By furnishing the defective equipment which caused the injury, the stevedore has thereby visited liability upon the shipowner. Therefore, in all fairness, the stevedore contractor should be held to warrant that the equipment furnished is suitable for the purpose, and should indemnify the shipowner for breach of such warranty.

Shipowner's Right to Indemnity Is Based on Principles Stated in this Court's Prior Decisions

The precise question, which involves stevedore-furnished equipment unsuitable because of *latent defect*, without proof of negligence by the stevedore, is of first impression before this Court. However, the shipowner's right to indemnity follows logically from the principles announced in this Court's prior decisions which have

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[7] *Hugev* v. *Dampsk Int.*, 170 F Supp 601, affd sub nom *Metropolitan Stevedore Co.* v. *Dampsk Int.*, 274 F2d 875 (9 Cir 1960); *Revel* v. *Amer. Export Lines*, 162 F Supp 279, affd 266 F2d 82 (4 Cir 1959).

considered the stevedore's warranty to the shipowner.[8]

In *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 US 124, the contracting stevedore stowed cargo in an unseaworthy manner, as a result of which a discharging longshoreman was injured. This Court held that the shipowner was entitled to full indemnity against the stevedore contractor for the damages recovered by the injured longshoreman, upon the ground that the stevedore had breached its implied warranty to the shipowner.

> "The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product." 350 US at pp. 133-34.

It is true the *Ryan* case involved negligence in performance of the stevedoring labor, rather than furnishing defective equipment. But this Court emphasized that the basis for recovery was not in tort, but in contract. And the Court made this significant statement:

"A like result occurs where a shipowner sues,

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[8] *Ryan Stevedore Co.* v. *Pan-Atlantic S.S. Corp.*, 350 US 124; *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 US 563; *Crumady* v. *The J. H. Fisser*, 358 US 423; *Waterman S.S. Corp.* v. *Dugan & McNamara*, 364 US 421; *Reed* v. *The Yaka*, 373 US 410.

> for breach of warranty, a supplier of defective ship's gear that has caused injury or death to a longshoreman using it in the course of his employment on shipboard." 350 US 130.

This statement exactly fits the facts of the case at bar.

The opinion also states that "competency and safety of stowage are inescapable elements of the service undertaken." 350 US at p. 133. Obviously, the stevedore cannot perform with "competency and safety" if it furnishes equipment that is not suitable for use on the job.

These same principles have been stated in the subsequent cases of *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 US 563 (where it was further emphasized that the stevedore's liability is based upon contractual warranty, and principles of negligence are not applicable); *Crumady* v. *J. H. Fisser*, 358 US 423; *Waterman S. S. Corp.* v. *Dugan & McNamara*, 364 US 421.

In the *Waterman* case this Court states:

> "The ship and its owner are equally liable for a *breach by the contractor* of the owner's nondelegable duty to provide a seaworthy vessel." (Emphasis supplied) 364 US at 424-25.

This language recognizes that a stevedore commits a breach of his warranty when he subjects the shipowner to liability under the latter's absolute warranty of seaworthiness.

Most important, and most recent, is *Reed* v. *The Yaka*, 373 US 410, decided May 27, 1963, subsequent

to the Court of Appeals decision of the case at bar. The reasoning of this Court in *The Yaka* makes clear that an independent contracting stevedore is liable to indemnify the shipowner for damages paid a longshoreman injured as a result of latently defective equipment furnished by the stevedore.

In *The Yaka*, the ship operator performed its own stevedoring work, instead of engaging an independent contractor stevedore. Thus, the ship operator hired the longshoremen directly and was their "employer." The question was whether the exclusive liability provisions of the Longshoremen and Harbor Worker's Act[9] relieved the ship operator from his usual liability to longshoremen for breach of the warranty of seaworthiness. In holding that it did not, the Court reasoned that if the ship operator had hired an independent contracting stevedore, who had furnished the latently defective equipment, the ship operator would have been liable to the longshoreman, but could then have recovered full indemnity against the contracting stevedore.

The opinion expressly points out that the cause of injury to the longshoreman was a *latent defect* in a pallet board furnished for use in the stevedoring work.

> "The district judge found that at the time of the injury petitioner was in the ship standing on a stack of rectangular, wooden pallets used in loading the vessel and that the sole cause of the injury was a *latent defect* in one of the planks of a pallet, which caused it to break." (Emphasis supplied) 373 US —, 10 L Ed 2d 448 at p. 450.

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[9] 33 USC § 905.

No negligence was involved. This Court stated clearly that if the stevedoring work had been performed by an independent contractor, the longshoreman could have recovered from the shipowner, who could then have recovered indemnity against the stevedore.

> "Thus, there can be no doubt that, if the petitioner here had been employed to do this particular work by an independent stevedoring company rather than directly by the owner, he could have recovered damages for his injury from the owner who could have then under Ryan shifted the burden of the recovery to petitioner's stevedoring employer."

The opinion points out there is no economic difference between allowing the longshoreman direct recovery against the shipowner who acts as his own stevedore, and allowing recovery against the shipowner who hires an independent contracting stevedore, and then allowing indemnity against the stevedore company. "In either case, under *Ryan*, the burden ultimately falls on the company whose default caused the injury."

These statements are not dicta,—they are the very basis for decision. And they exactly fit the case now before the Court. Respondent stevedore is an independent contractor. It furnished latently defective equipment. Therefore, the burden must ultimately fall on the respondent stevedore company, whose default caused the injury.

The Yaka decision was rendered after the Court of Appeals decision in the present case. Otherwise, it is fair to assume it would have been followed by the Court of Appeals.

Stevedore's Warranty Is Absolute as to Stevedore-Furnished Equipment—Proof of Negligence Not Required

The stevedore's implied warranty is breached by furnishing and bringing aboard the vessel equipment which is not suitable for the purpose intended. The shipowner's right to indemnity does not depend upon proof of negligence.

This Court has repeatedly stated that the stevedore's warranty is "comparable to a manufacturer's warranty of the soundness of its manufactured product." *Ryan Stevedore Co.* v. *Pan-Atlantic*, 350 US 124, pp. 133-34; *Crumady* v. *J. H. Fisser*, 358 US 423, 428-29; *Waterman S.S. Corp.* v. *Dugan & McNamara*, 364 US 421, 424; *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines Ltd.*, 369 US 355, 359.

The overwhelming weight of authority establishes that the manufacturer's warranty is absolute, and does not depend upon proof of negligence.

Long ago, this Court in *Kellogg Bridge Co.* v. *Hamilton*, 110 US 108 (1884) quoted with approval from *Leopold* v. *Vankirk*, 27 Wis 152, as follows:

> "The general rule of law with respect to implied warranties is well settled, that when the manufacturer of an article sells it for a particular purpose, the purchaser, making known to him at the time the purpose for which he buys it, the seller thereby warrants it fit, and proper for such purpose and *free from latent defects.*" (Emphasis supplied) 110 US 108, 115.

In *Booth S.S. Co.* v. *Meier & Oelhaf Co.*, 262 F2d

310 (2 Cir 1958), involving the same question now before this Court, the Court said:

> "The implied warranty of suitability for a particular use made by manufacturers and retailers is generally considered absolute, however, and is not avoided by the fact that in the exercise of ordinary care the defendant could not discover the injury-causing defect." 262 F2d 310 at p. 314.

Compare also The Uniform Sales Act, Sec 15(1):[10]

> "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

Even independently of this Court's repeated statements likening the stevedore's warranty to a manufacturer's warranty of the soundness of its product, the stevedore as a supplier of the equipment owes the implied warranty of suitability for the purpose intended. The stevedore contractor furnishes the equipment for a particular purpose,—indeed for its own use in the stevedoring operations. The shipowner relies upon the stevedore as a specialist and expert.[11] The stevedore derives profit from the transaction. Under these circumstances a supplier of chattels warrants suitability for the intended use.

In Williston on Contracts, Rev Ed § 1041, it is stated:

> "Analogy with the law of sales justifies the fur-

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[10] Williston on Contracts, Rev Ed 1936, § 982.

[11] See Note 7, supra.

ther statement that if the hirer reasonably relied on the bailor's superior skill or knowledge in furnishing suitable property, the latter would be liable even though in fact ignorant of the defects in the goods which he furnished."

In *Booth S.S. Co.* v. *Meier & Oelhaf Co., supra,* the Second Circuit said:

"It has repeatedly been suggested that the liabilities of suppliers should be co-extensive with those of the law of sales." 262 F2d at p. 314.

On this point we again refer to this Court's statement in the *Ryan* case:

"A like result occurs when a shipowner sues, for breach of warranty, the supplier of defective ship's gear that has caused injury or death to a longshoreman using it in the course of his employment on shipboard." 350 US 130.

If one who hires equipment to another for a particular use is held to be an absolute warranty that the equipment is suitable for the intended use, then *a fortiori* is the stevedore in this case, who owned and furnished the equipment, and at all times retained exclusive control and supervision over its use (R. 25).

To require the stevedore to warrant seaworthiness of equipment furnished by him does not impose an unreasonable burden on the stevedore. For, while the warranty is absolute, the standard of seaworthiness is only "reasonable fitness" and "reasonably suitable" for the intended purpose. *Mitchell* v. *Trawler Racer,* 362 US 539, 550. In other words, the stevedore's duty as to equipment which he supplies is no greater than the shipowner's duty as to its vessel and equipment.

It may also be observed that it would be unfair to place on the shipowner the burden of proving that the stevedore was negligent, since all evidence as to age, history, inspections, and tests of the equipment, and also its use on the vessel, is exclusively in possession of the stevedore.

Courts of Appeals Decisions

Petitioner's right to indemnity is supported by the unanimous opinion of the Second Circuit in *Booth S.S. Co.* v. *Meier & Oelhaf*, 262 F2d 310 (2 Cir 1958), and by the sound reasoning of Judge Jertberg's forceful dissent in the present case. 310 F2d at p. 488 (R. 54-64).

In the *Booth* case, an independent ship repair contractor, pursuant to oral agreement with the shipowner, undertook to overhaul the vessel's engines. This included the work of removing tight-fitting cylinder liners. For use in the work, the contractor furnished a wire strap. It broke, causing injury to plaintiff, who was an employee of the contractor. The strap broke because of latent defect. There was no proof of negligence on the part of the contractor.

The district court denied the shipowner's claim for indemnity against the contractor for damages recovered by the plaintiff. The Court of Appeals reversed, holding that under the contract there was an implied warranty on the part of the contractor that the work would be done safely, and that this warranty was breached by the contractor supplying equipment not suitable, due to latent defect, for the purpose intended, even though the contractor was not negligent.

The well-reasoned opinion in *Booth* could well stand as petitioner's brief in the present case. It points out that the contractor, as a supplier of equipment for a particular purpose, owes an absolute warranty of suitability, and also the fairness of placing the ultimate risk upon the party supplying the equipment who is in the best position to minimize the risk.

The Court of Appeals decision in the present case is by only two judges. 310 F2d 481 (R. 43-54). The opinion is based largely on semantics and a narrow interpretation of the words "workmanlike service," which the majority equates to absence of negligence. In this, the majority overlooks the fact that contracting stevedores do not merely furnish labor, but furnish all sorts of gear and equipment for their own use. Scant attention is given to this Court's oft-repeated statements that "the stevedore's warranty is comparable to the manufacturer's warranty of the soundness of its product" and that "competency and safety of stowage are inescapable elements of the service undertaken." The majority also ignores that the public policy, to minimize the risk of injury to shipboard workers, requires placing the ultimate loss upon the party who is in the best position to minimize that risk, rather than upon the shipowner, who has no control over tools and equipment brought aboard by independent contractors for their own use. And finally, of course, the majority did not have the benefit of this Court's most recent decision in *Reed* v. *The Yaka*, discussed above.

Petitioner submits that Judge Jertberg's forceful dis-

sent contains better reasoning. It follows the *Booth* case, with emphasis upon the contracting stevedore's warranty being like that of a manufacturer, and also the better position of the stevedore to avoid risks of accident resulting from defects in the equipment which he supplies. Judge Jertberg also points out the simple fairness in placing the ultimate liability upon the contractor who, by furnishing the defective equipment, has visited a loss upon the shipowner.

Public Policy to Avoid Risk of Injury

Stevedore-furnished equipment is used in hazardous work. Public policy requires placing the ultimate loss upon the party in the best position to avoid or minimize the risk of injury to shipboard employees.

The shipowner, vis-a-vis the injured longshoreman, is subject to absolute liability upon the warranty of seaworthiness, and is therefore responsible for the result of latent defect in stevedore-furnished equipment which he cannot prevent. *Alaska S.S. Co.* v. *Petterson*, 347 US 396, 401. This assures monetary damages to the injured longshoreman. But it does nothing to avoid the injury, because the shipowner has no control over the equipment furnished by the independent contractor.

In order to protect the worker from injury (rather than merely pay for his broken limb) the ultimate burden should be placed upon the party best able to eliminate the hazard,—namely the stevedoring contractor. For it is the stevedore who owns the equipment, supplies it, and brings it aboard the vessel, and retains con-

trol and supervision over its use (R. 25). The stevedore knows the source and history of the equipment and has the opportunity to keep records and make periodic tests, and may take precautions beyond those required by standards of ordinary care.

This was an important consideration in the *Booth* decision. See 262 F2d, pp. 314-15. The same principle is expressed by a different panel of the Second Circuit in *DeGioia* v. *United States Lines*, 304 F2d 421:

> "The primary source of the shipowner's right to indemnity, as a practical matter, is his nondelegable duty to provide a seaworthy ship, by virtue of which he may be held vicariously liable for injuries caused by hazards which the longshoremen either created or had the primary responsibilty or opportunity to eliminate or avoid. *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, supra; 364 U.S. 421, 424-425, 81 S. Ct. 200, 5 L. ed. 2d 169; *Paliaga* v. *Luckenbach S.S. Co.*, 2 Cir., 301 F.2d 403, 408. The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved. . . . The scope of the stevedore's warranty of workmanlike performance is to be measured by the relationship which brings it into being." Pp. 425-26.

The same thought is well expressed in Judge Jertberg's dissenting opinion:

> "Since the loss must be borne by either one or the other, it is not unfair that such loss be ultimately borne by the one best able to eliminate the hazard, to wit: the owner of the defective gear or equipment who supplied it and whose use and control over it was exclusive." 310 F2d 491 (R. 60-61).

Fairness and Equity Require Placing the Ultimate Loss on the Stevedore

It is true that in the present case neither the stevedore nor the shipowner was guilty of negligence. But when the stevedore brought defective equipment aboard the vessel, it imposed a liability on the innocent shipowner. The shipowner is liable for the latently unseaworthy condition of the equipment brought aboard and used by the stevedore. *Alaska S.S. Co.* v. *Petterson*, 347 US 396.

This is a vicarious liability. The shipowner has not been at fault. The shipowner relies on the contractor and has no control over equipment which the stevedore brings aboard. It is the contracting stevedore who has created the unseaworthiness, and who has imposed liability upon the shipowner.

The shipowner is held liable to the injured man upon the absolute warranty of seaworthiness because of the humanitarian policy to protect the men doing seamen's work.[12] But the contest between shipowner and stevedore company is between parties who are economically equal. As between the two, fairness and equity require that the ultimate loss fall on the stevedore who has visited the liability upon the shipowner.

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[12] *Seas Shipping Co.* v. *Sieracki*, 328 US 85; *Mitchell* v. *Trawler Racer*, 362 US 539.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed; and the case remanded with directions to enter judgment in favor of petitioner.

Respectfully submitted,

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DATED August 20, 1963.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 82

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,
Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,
Respondent.

BRIEF OF RESPONDENT OREGON STEVEDORING COMPANY, INC., IN OPPOSITION TO MOTION OF AMERICAN MERCHANT MARINE INSTITUTE, INC., PACIFIC AMERICAN STEAMSHIP ASSOCIATION, AND LAKE CARRIERS' ASSOCIATION FOR PERMISSION TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF POSITION OF PETITIONER, ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE

To the Honorable Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-63

In the Supreme Court
of the United States

OCTOBER TERM, 1962

No. 876

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,

Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,

Respondent.

BRIEF OF RESPONDENT OREGON STEVEDORING COMPANY, INC., IN OPPOSITION TO MOTION OF AMERICAN MERCHANT MARINE INSTITUTE, INC., PACIFIC AMERICAN STEAMSHIP ASSOCIATION, AND LAKE CARRIERS' ASSOCIATION FOR PERMISSION TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF POSITION OF PETITIONER, ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE

To the Honorable Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States

The reasons for respondent, Oregon Stevedoring Company, Inc. withholding consent to the filing of an *amici curiae* brief by the various steamship associations are as follows.

The factual position of the associations is exactly the position of the petitioner in this case. The petitioner is a shipowner, albeit a foreign shipowner. The associations are collections of shipowners. Their relation to the stevedore contractor is exactly the same as that of the petitioner, i.e., they enter into contracts for stevedoring services aboard vessels. The associations bring no new viewpoint to the determination of this case before this Court. The thrust of the associations' motion is merely that there are other shipowners who contract with stevedore companies and they are interested in the outcome of this case. Certainly, there are other stevedore companies who are interested in the outcome of this case. There are probably people similarly situated to petitioner and respondent in practically every case before this Court. Certainly, cases should not be decided on the basis of how many people similarly situated can be found to line up on one side or the other. The associations point to no facts not to be presented by petitioner and respondent except to state that they are in similar fact situations.

From the similarity of factual positions follows the similarity of legal questions presented by petitioner and the associations. The associations in their motion point to no question of law not directly presented between petitioner and respondent. The question to be decided by this Court is simply the interpretation of the contract between a shipowner and a stevedore. The associations state in their motion that they intend to cite authorities relating to the implied warranty of workmanlike services, to analyze *Booth SS Co. v. Meier and*

Oelhaf, and to show the inequitable result of the decision of the court of appeals. (Motion, p. 4). This is exactly what the petitioner does in its brief (Petitioner's Brief, p. 6, 16, 20). Obviously, these are exactly the issues which petitioner must raise and discuss in its brief in its attempt to upset the decision of the court of appeals. The associations cannot point to any new question of law which is not presented to the Court in petitioner's brief.

Respondent would also point out to the Court that the United States has appeared *amicus curiae* on behalf of the petitioner, respondent having been served with a brief by the United States on August 27, 1963. The interest of the United States is as the world's largest shipowner (Brief, *amicus curiae*, p. 4). The United States in its brief discusses exactly the same questions of law which the associations state they want to discuss and complains of the same inequities of which the associations complain (Brief, *amicus curiae*, p. 4). Respondent believes that the United States has adequately covered the ground which the associations now intend to recover and that one *amicus curiae* shipowner, particularly the largest in the world, is enough.

The associations complain bitterly about the economic impact of this decision (Motion, p. 2, 3). The simple answer is that the relationship between the shipowner and stevedore is one of contract and the parties are free to distribute the loss involved in personal injuries as they desire. Certainly the stevedore companies are not in any stronger economic position than the shipowners. Practically all of the contracts

between shipowner and stevedore have some provision for distribution of this type of loss as did the contract in this case (R. 34). Therefore, this case will have no great impact on the steamship industry and the considerations of economic impact cited by the associations have no relevancy.

For the foregoing reasons, respondent withheld its consent to the filing of a brief, *amici curiae*, by the shipowners associations and now respectfully submits that the motion to do so should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 82

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,

Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-63

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 876

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,

Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT

Question Presented

A fairer statement of the sole question presented to this Court is: Does a stevedore company breach its implied warranty of workmanlike service when it supplies equipment to a ship to be used in connection with the loading operation and that equipment fails, subjecting the shipowner to liability to an employee of the stevedore company, even though the stevedore company has not been negligent in any way?

The question of the effect of the express provision of the contract between petitioner and respondent

whereby respondent agreed to be responsible for injury of any person caused by its *negligence* (Resp. Exh. 21, R. 34) was not reached by the Court of Appeals (R. 54), is not presented in petitioner's brief, and will not be discussed by respondent, except as it may relate to the implied warranty question.

SUMMARY OF ARGUMENT

The stevedore's warranty to a shipowner for whom it performs services is, in the absence of an express warranty, a warranty of workmanlike service. The stevedore is not an insurer of the work it performs or of the gear it furnishes to be used in connection with such work. The test to be applied to determine whether this warranty has been breached is one of reasonable care. When it has been determined that the stevedore has exercised reasonable care, the stevedore has not breached the warranty and the shipowner is not entitled to indemnity for its losses incurred in the defense of a personal injury claim by a longshoreman.

To compare the stevedore's warranty to the warranty of a bailor or supplier of equipment does not assist the shipowner in imposing an absolute warranty on the stevedore for the weight of authority at common law is that such a supplier has no duty beyond one of reasonable inspection. Most of the policy considerations which influence the courts in imposing an absolute warranty of fitness upon the manufacturer of a product do not apply in the shipowner-stevedore indemnity cases. In particular, the consideration of imposing liability on

the one most able to pay is inapplicable. That consideration was applicable in the matter between the longshoreman and the shipowner and no doubt influenced this court in its decision in *Reed* v. *The Yaka*, 373 U.S. 410. There is no policy reason why the onerous burden of the shipowner to provide a seaworthy ship should be passed on to a stevedore, who has been found by the trier of fact to be free of negligence.

ARGUMENT

Background of the Stevedore Warranty

It is agreed that the shipowner now owes to longshoremen doing work traditionally performed by seamen, a warranty of the seaworthiness of the ship and its appurtenances, which means that the ship and its appurtenances must be reasonably fit for their intended use. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85. This warranty extends to equipment brought aboard the ship by a stevedore contractor and used as a part of the ship's equipment in the furtherance of the contractor's work. *Alaska S.S. Co.* v. *Petterson*, 347 U.S. 396.

In 1955, this Court decided that stevedore contractors were subject to indemnity claims by shipowners based on an implied warranty of workmanlike service in spite of the exclusive liability provision of the Longshoremen's and Harbor Workers, Compensation Act.[1] *Ryan Stevedore Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U.S. 124.

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[1] 33 U.S.C. §905.

The *Ryan* case involved negligence in stevedore operations as admitted by petitioner (Pet. Brief, p. 9) but petitioner would draw from the language in the opinion an absolute warranty to insure the shipowner for any loss sustained by the shipowner as the result of the failure of the gear supplied by the stevedore, without regard to negligence.

This Court was faced with a dilemma at the time of the Ryan decision which should be kept in mind in analyzing the opinion. This dilemma is pointed out by the Court of Appeals in its decision in this case (R. 50, 51). This Court had held prior to *Ryan* that there could be no contribution based on comparative fault between shipowner and stevedore in the case of a longshoreman who sued a shipowner for personal injury. *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282. The basis of the Court's decision was that there was no contribution between joint tortfeasors at common law and the Court would not extend the equal division rule applied in collision cases to a non-collision case. The stevedore company was insulated from tort claims against it by its employees because of the provision of the Longshoremen and Harbor Workers' Compensation Act[2] and therefore a shipowner whose negligence may have been only 25% responsible for injury as compared with a stevedore whose negligence was 75% responsible had to bear the entire burden of the loss unless he had by express contract of indemnity made some arrangement to pass the loss or part of it off to someone else.

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[2] See Note 1 supra.

In order to relieve the shipowner of this burden, it was necessary to couch the shipowner's claim against the stevedore in terms of contract and not tort. The language of this Court in *Ryan* which immediately precedes the quoted language relied upon by petitioner (Pet. Brief, p. 9) puts the matter in proper context:

> "The shipowner's claim here also is not a claim for contribution from a joint tortfeasor. Consequently, the considerations which led to the decision in Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U. S. 282, 96 L. Ed 318, 72 S. Ct. 277, are not applicable. See American Mut. Liability Ins. Co. v. Matthews (C.A.2d N. Y.) 182 F.2d 322." 350 U.S. at p. 133.

The decision of the Court of Appeals in this case succinctly states the proper analysis of the language quoted by petitioner:

> "If the shipowner was to be relieved at all from the onerous burden of *Halcyon*, liability against the stevedoring company for its wrongs would necessarily have to be predicated upon contract and not tort. This background to *Ryan* cannot be separated from an analysis of the liability of the stevedoring company for breach of the implied warranty of workmanlike service. And when this background is kept in mind it seems reasonable to posit that the warranty of workmanlike service was intended only to impose liability in contract similar to that which would otherwise have been imposed in tort (for being negligent in the performance of stevedoring services)—not that the one (warranty) is the substitute for the other (tort) but that the standard of performance in each case is the same." (R. 51)

This analysis of the meaning of the language in the *Ryan* case is further buttressed by the language of this

Court in the same paragraph quoted by petitioner but not reported in petitioner's brief:

> "The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service." 350 U.S. at p. 134.

This Court took care to point out that we are going to look at a standard of performance and what is that standard? The standard is to load and unload cargo "with reasonable safety."[3] There is no absolute standard set up by this Court. In each case it is a question of fact whether the contractor performed its work in a careful and prudent manner and this involves a determination of whether the acts of the contractor have been such as would be done by a reasonable and prudent contractor similarly situated. In other words, a test based upon the concept of negligent *versus* non-negligent conduct. Here, the petitioner having contended that respondent was negligent (R. 18) and having failed to prove it (R. 26) submits that it is entitled to a different standard; one that puts it into the position of an assured.

The Court of Appeals, in its decision has discussed the lay and legal meaning of the term "workmanlike" (R. 48) which is the term used in the *Ryan* case at one point to describe the stevedore warranty.[4] It is clear that from either the standpoint of the layman or the judge, the word connotes a performance which is rea-

[3] 350 U.S. at p. 130.
[4] 350 U.S. at p. 133.

sonable under all of the circumstances. It is a performance which is free from negligence, or phrased another way, a performance as good as those similarly situated usually render.

Thus, we leave *Ryan* with the stevedore impliedly warranting to the shipowner that it will perform its services in a workmanlike manner and indemnify the shipowner for its failure to do so. Do the cases subsequent to *Ryan* impose a higher obligation on the stevedore? We respectfully submit they do not.

Supreme Court Decisions Subsequent to Ryan

The Supreme Court cases subsequent to *Ryan* have consistently described the warranty of the stevedore as one of "workmanlike" service.

In *Weyerhaeuser SS Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, this Court stated in reference to the obligation of the stevedore company.

> "We believe that respondent's contractual obligation to perform its duties with *reasonable safety* related not only to the handling of cargo as in *Ryan*, but also to the use of equipment incidental thereto, such as the winch shelter involved here. * * * If in that regard respondent rendered a *substandard performance* which led to forseeable liability of petitioner, the latter was entitled to indemnity absent conduct on its part sufficient to preclude recovery." (Emphasis supplied) 355 U.S. at p. 567.

The Court does note that theories of "active" or "passive" and "primary" or "secondary" negligence are not to be used to determine the question of indemnity but there is no intimation that a finding of negligence or

substandard performance by the stevedore is no longer appropriate and necessary for recovery by the shipowner in the absence of an express contract of indemnity.

In *Crumady* v. *The J. H. Fisser*, 358 U.S. 423, this Court stated in holding that the stevedore was responsible for indemnity to the shipowner:

> "We conclude that since the negligence of the stevedore, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over." 358 U.S. at p. 429.

In *Waterman SS Corp.* v. *McNamara, Inc.*, 364 U.S. 421 this Court stated in reference to the warranty of a stevedore company:

> "The warranty may be breached when the stevedore's negligence does no more than call into play the vessel's unseaworthiness." 364 US at p. 423.

The petitioner's quotation concerning the *Waterman* case is no more than a reference to the Court's reasoning that it makes no difference insofar as the duty to indemnify is concerned whether the longshoreman brings an *in rem* or *in personam* proceeding.[5]

Petitioner seizes on the language of the most recent case of *Reed* v. *The Yaka*, 373 U.S. 410, which it regards as determinative of this case and even assumes that the Court of Appeals, if it had followed the *Reed* case would have reached a different result.[6]

A closer look at the case should somewhat temper petitioner's optimism. In the first place, there was an

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[5] Pet. Brief p. 10.

[6] Pet. Brief p. 12.

express hold harmless agreement between the stevedore-charterer and the shipowner for any claim arising out of the operation of the vessel. 183 F. Supp. 69, 70. Thus, the liability of the stevedore to the shipowner was, according to the trial judge, because of the terms of an express contract. 183 F. Supp. at 77.

The Court then was not faced with the question of deciding the scope of the stevedore's implied warranty for the stevedore was bound to an express hold harmless agrement. The problem facing the Court was the problem of the insulating effect of the Longshoremen's Act when the stevedore also was the operator of the ship. If the longshoreman could not recover against his employer, he would be without a remedy for his injury other than by way of compensation under the Longshoremen's Act. The Court merely held that when a stevedore becomes a shipowner, it cannot escape the shipowner's obligation to supply a seaworthy ship because of the provisions of the Longshoremen's Act.

The Court did not have occasion to pass upon the extent of the stevedore's implied warranty. By expression at least, the Court seemed to indicate it felt the warranty was one of non-negligent conduct.

> "And *Ryan's* holding that a negligent stevedoring company must indemnify a shipowner has in later cases been followed and to some degree extended." 373 U.S. at p. 415.

The cases cited in the footnote to this quotation are those that extend the warranty of workmanlike service to other than the immediate contracting party on the third party beneficiary theory. *Crumady* v. *J. H. Fisser*

supra; Waterman SS Corp. v. *Dugan & McNamara, Inc., supra.*

As we have noted, the cases in this Court subsequent to *Ryan* describe the breach of implied warranty of the stevedore in terms of negligence and give no indication of any higher obligation.

Court of Appeals Decisions Subsequent to Ryan

Only one case subsequent to *Ryan* has decided that the implied warranty of workmanlike service means more than non-negligent conduct. *Booth SS Co.* v. *Meier & Oelhaf Co.*, 262 F.2d 310 (C.A. 2). The Court of Appeals for the Ninth Circuit in this case rejects the holding of the Second Circuit in the *Booth* Case (R. 47). These are the only cases which directly consider the point.

The Court in the *Booth* case notes that the question of the liability of a contractor for indemnity, when said contractor has been without fault was not involved in the *Ryan* or *Weyerhaeuser* cases. 262 F.2d at p. 313. These cases were negligence cases.

The Court then comments upon cases cited by the shipowner for the proposition that a supplier of chattels is the absolute warrantor of their fitness for the use for which supplied:

> "Appellant has cited many cases in the federal, state and foreign courts which establish that a supplier of chattels, a bailor or lessor for example, impliedly warrants the suitability of the chattel for the use for which it is supplied. See, *e.g. Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.*, 1926 A.

M. C. 342, 10 F.2d 769 (9 Cir.), *Boston Woven Hose & Co.* v. *Kendall*, 178 Mass. 232 (Mass. 1901) (HOLMES, C. J.); *Hoisting Engine Sales* v. *Hart*, 237 N. Y. 30 (1923); *Alaska S.S. Co.* v. *Pacific Coast Gypsum Co*, 71 Wash. 359, 128 Pac. 654 (1912); *Mowbray* v. *Merryweather* (1895) 2 Q.B. 640. In not one of these cases, however, was the injury producing defect one which would not have been disclosed on careful visual inspection. In the *Mowbray* case it was stipulated that the plaintiff's failure to detect the defect was negligent, and in others the fact that the defect was not hidden is equally clear. The point of concern in each case appears to have been whether the party suing for indemnity could recover despite his own possibly negligent failure to detect the flaw; and in all it was held that he could so recover. But in none was the court required to determine whether an injury produced by a hidden flaw would itself constitute a breach of the implied warranty. In *Hoisting Engine Sales* the New York court characterized the supplier's contract duty as at least one of "reasonable care and skill." and declined to decide whether the warranty might also be as absolute as warranties in the law of sales." 262 F.2d at p. 313.

It is interesting to note that the Court in the *Booth* case sorely limits the authority of the leading cases cited by the United States for the proposition that a supplier of chattel impliedly warrants the fitness of the product supplied without regard to negligence (Brief for the U.S. p. 8, 9). We shall have more to say about this alleged common law principle of absolute warranty later on.

The *Booth* case does go on to hold that a supplier of chattel impliedly warrants the fitness of the chattel relying on a number of commentators and some dicta in a previous decision by the Court. 262 F.2d at p. 314.

We will discuss later the merits of relying on the commentators in determining whether a common law warranty of fitness exists as applied to suppliers. The Court also places a great deal of emphasis on the ability of the supplier to make tests and inspect materials to detect defects and comes to the conclusion that it is reasonable that the supplier be charged with liability even though the supplier is not negligent. This argument is, we believe, capably answered by the Ninth Circuit (R. 47 f.n.6).

The point of the matter is that the shipowner has had every opportunity to prove what the Second Circuit says is relevant. The shipowner is not dealing with some manufacturer thousands of miles away; he is dealing with a stevedore to whose city of business he brings his ship. The shipowner can take deposition, prepare interrogatories, do all that is needed to establish his cause of action based on negligence. He is probably aided by the *res ipsa loquitur* doctrine and the stevedore must go forward and prove that it was not negligent in its operation. Generally the shipowner will win. The trier of fact, be it judge or jury, will determine that the stevedore was negligent. If no tests were made, the stevedore will be held negligent in failing to make any.

In this case, the trial judge determined that the evidence adduced by the stevedore was sufficient to overcome any inference of negligence. (Findings of Fact (22), R. 26). The petitioner failed to prove that respondent was negligent and wants another bite at the apple. Everything suggested by *Booth* in the way of

placing the burden on the stevedore because of its greater control over the chattel can be accomplished by applying a negligence test to the stevedore's conduct and giving the shipowner the benefit of any presumptions to which he may be entitled. To do otherwise is to make the stevedore an insurer of its operations.

This Court in *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 369 U.S. 355 was faced with the question of whether a stevedore is liable as a matter of law when a shipowner is negligent in failing to provide a safe place to work, and the stevedore proceeds to work knowing of the unsafe place to work. A longshoreman was injured while discharging bales of burlap. Around each bale of burlap were steel bands and the method of discharge was to hook onto a bale and raise it out of the hatch. During the course of discharge, two bands in one bale broke and the bale fell. The longshoreman sued the shipowner who impleaded the stevedore. The trial court submitted interrogatories to the jury which were answered and which found the shipowner negligent and the vessel unseaworthy and further found the stevedore performed its work in accordance with its contractual obligation. 269 U.S. at p. 357. The trial court entered judgment against the shipowner on the claim by the longshoreman and in favor of the stevedore on the indemnity claim. The Court of Appeals reversed the judgment in favor of the stevedore on the basis that if the shipowner was negligent in failing to provide a safe place to work, the stevedore was equally negligent as a matter of law in continuing to work. 369 U.S. at p. 358.

This Court reversed the Court of Appeals in its holding that the stevedore was liable as a matter of law. The Court held that it was up to the jury to determine as a question of fact whether the stevedore had discharged the cargo with the utmost care. This Court approved the following charges to the jury on the question of indemnity.

> "There again you have to run the whole gamut of facts in the case. You will have to decide whether or not there was an unreasonable discharge of this cargo, an unsafe method used in the discharge of this cargo, in the placing of the hook. Did they breach that contract to do it in a workmanlike manner with the utmost care? The steamship company says, 'Yes, they did. They breached that contract. They did not do it in a workmanlike manner. All the evidence here points to the fact that they did not do it with the utmost care, and therefore they caused the condition which created the liability which is ours, which the plaintiff has secured against us as defendants.' "

The trial judge further charged:

> "* * * Whether or not there was a breach of that contract, what you look to decide is whether or not there was reasonably safe discharge of that cargo by the Atlantic & Gulf Stevedores. If it was not, it was not done in a reasonably safe manner, then Atlantic & Gulf Stevedores would breach their warranty under the contract. If there was sub-standard performance on which it was foreseeable by them that some injury might happen or eventuate, then Atlantic & Gulf Stevedores would be responsible to the plaintiff shipping company." 369 U.S. p. 362.

The decision makes it clear that the determination of whether a stevedore has performed in a sub-standard

manner is to be left to the trier of fact who is to apply a test of reasonable care under the circumstances. The stevedore is not an insurer.

A later case from the same circuit that decided the *Booth* case but with slightly different panel lays down what respondent takes as the proper standard to be applied to the stevedore-shipowner implied warranty field:

> "* * * The contract between Clark and Cunard stated that the former would 'provide all necessary stevedoring labor, including winchmen, * * * foremen and such other stevedoring supervision as may be required for the proper and efficient discharging of cargo from or the loading cargo into vessel's holds. * * *' Under this agreement Clark was not required to act as an insurer against any loss by Cunard or to discover and correct every hidden danger. Its duty was only to perform its services with 'reasonable safety.' *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 1958, A. M. C. 501; *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 1956 A M. C. 9. 100 L. Ed. 133" *Calderola* v *Cunard S.S. Co., Ltd.*, 279 F.2d 475, 478, cert. den. 364 U.S. 884.

The same test was applied by the Third Circuit in *Hodgson* v. *Lloyd Brasileiro Patriomanio Nacional*, 294 F.2d 32, 34.

The Court of Appeals' decisions subsequent to *Ryan*, with the exception of *Booth*, pose the stevedore's warranty as one of reasonable care and a different panel in the *Booth* case might have decided otherwise. Now, let us turn to the so-called common law warranty of fitness seized upon particularly by *amici curiae* as part of the stevedore's warranty of workmanlike service.

The Warranty of a Supplier of Chattel

The statement in the *Ryan* decision that a stevedore's obligation to the shipowner is "comparable to a manufacturer's warranty of the soundness of its manufactured product"[7] must be taken in context. This Court was struggling with the *Halcyon*[8] decision which held that there was no contribution among joint tortfeasors. This Court alluded to a manufacturer's warranty to emphasize its analysis of the theory of indemnity as one sounding in contract rather than in tort. We submit that the language is not to be taken literally to impose every warranty of a manufacturer upon a stevedore company whose primary function is the rendering of service to the shipowner and who incidentally brings aboard gear to be used in the furtherance of the performance of that service.

Petitioner's citation to the case of *Kellogg Bridge Co.* v. *Hamilton*, 110 U.S. 108[9] refers to a case in which a manufacturer of an article *sells* it. There is is no dispute that a manufacturer who sells a product impliedly warrants its fitness for the intended purpose. *Uniform Sales Act* § 15(1).

It is obvious that there is no sale of goods by the stevedore. The Court of Appeals in the *Booth* case likens the stevedore to a bailor who supplies equipment.[10] The Court of Appeals for the Ninth Circuit points out

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[7] 350 U.S. at p. 133, 134.
[8] 342 U.S. 282.
[9] Pet. Brief p. 13.
[10] 262 F.2d at p. 314.

that a stevedore is engaged in the performance of a service, not the manufacturing of a product. (R. 53).

With this background in mind, we turn to the law which is concerned with the implied warranty of a non-manufacturer and non-seller. The two types of cases comparable to the fact situation of the stevedore supplier are those of bailment for hire and contract for work, labor, and materials.[11]

1. Bailments for Hire

It is rather sadly noted by the commentators that proof of negligence is required in most of the cases which deal with the question of holding a bailor liable for furnishing defective chattel.

> "While most of the cases are *contra*, there are a few bailment-personal injury cases which hold the bailor strictly liable in warranty for furnishing a latently defective chattel." 1 Fromer and Friedman, *Products Liability* § 19.02, p. 501.
>
> "Far more significant, however, is the failure of many courts to follow the analogy of the Uniform Sales Act as respects liability for latent defects. Before its enactment, there was considerable support for the view that a seller did not warrant against latent defects. The Act gave that view its quietus as to sales, but it persists in bailment cases." Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 Col. L. Rev. at p. 657.

The *Booth* opinion disposes of at least two of the leading cases cited by the United States in its brief as standing for the proposition that the warranty is abso-

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[11] Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 Col. L. Rev. 653, 655.

lute.[12] Those cases are *Mowbray* v. *Merryweather* (1895) 2 Q. B. 640 and *Hoisting Engine Sales Company* v. *Hart*, 237 N. Y. 30, 142 N. E. 342. As the *Booth* decision points out, these cases did not decide whether an injury produced by a latent defect would constitute a breach of warranty.

The weight of authority in the bailment field is still in accord with the opinion expressed in *McNeal* v. *Greenberg*, 40 Cal. 2d 740, 255 P.2d 810:

> "A bailor's implied warranty of fitness does not make him an insurer against all of the personal injuries suffered from the defective operation of the bailed chattel. He impliedly warrants only that he has exercised reasonable care to ascertain that the chattel is safe and suitable for the purpose for which it was hired." 255 P.2d at p. 812.

A later California case approving the opinion expressed in the *McNeal* case is *Rohar* v. *Osborne*, 133 Cal. App. 2d 345, 284 P.2d 125, 130.

The case of *Koser* v. *Hornbeck*, 75 Idaho 24, 265 P.2d 988 states the case law applicable to the rental or bailment of a horse.

> "The form of the action is of no real consequence, because the courts all agree that the bailor is not an insurer, and that a mere breach of the implied warranty is not alone sufficient ground for recovery. In addition thereto, the plaintiff must prove that the keeper had some knowledge, or the facts are such as to charge him with knowledge, of the unsuitability of the animal; or negligence in failing to take reasonable precautions to determine its suitability; or in failing to warn the prospective

[12] 262 F.2d at p. 313.

rider of the facts. So whether the action be ex contractu or ex delicto, the required proof is the same." 265 P.2d at p. 991.

Another horse rental case affirming a judgment for the defendant and approving of a test of reasonable care for the bailer is *Dam* v. *Lake Aliso Riding School*, 6 Cal. App. 2d 395, 57 P.2d 1315, 1318. Two cases to the same effect in the non-horse field are *Moore* v. *City of Ardmore*, 188 Okla. 74, 106 P.2d 515, and *Price Boiler and Welding Co.* v. *Gordon*, 138 F. Supp. 43.

In this respect, it would perhaps be helpful to look to the law of the jurisdiction where the contract in this particular case was to be performed, Oregon. The case of *Miller* v. *Hand Ford Sales, Inc.*, 216 Or. 567, 340 P.2d 181 discusses the law of implied warranty as it applies to a bailment for mutual benefit but decides on the facts of the case that there was no bailment for mutual benefit. The court notes that there are several classes of bailment for mutual benefit and one of the classes is where the use of the property is incidental to some business transaction between the parties. 340 P.2d at p. 184. This would seem to fit exactly the relationship between the stevedore and the shipowner. The court states the obligation of such a bailor in the following terms:

> "If the bailment is for the mutual benefit of both the bailor and the bailee, such as a let for hire agreement, then a higher duty arises on the part of the bailor, the general rule being that, while the bailor is not an absolute insurer against injuries from a defective chattel, he is charged with the duty of inspection to determine whether or not the chattel is fit for the purposes intended. Thus, if the defect was discoverable, he became liable for

injuries to the bailee, arising from this unsafe condition, under the theory of an implied warranty of fitness. *Eklof* v. *Waterston*, 132 Or 479, 489, 295 P. 201, 68 ALR 1002; 6 Am. Jur. 309, Bailment § 194." 340 P.2d at p. 184.

2. Contracts for Work, Labor and Materials

Another field in which the courts have been reluctant to import an implied warranty of fitness is in the field of contracts which are primarily for service rather than the furnishing of materials.

The leading case is *Perlmutter* v. *Beth David Hospital*, 308 N.Y. 100, 123 N.E.2d 792. The New York Court of Appeals held in an action for damages founded on an alleged breach of warranty of fitness of blood supplied by a hospital that the transaction was not a sale and, therefore, no warranty was implied. The Court says that the answer turns upon whether the transfusion described in the Complaint constitutes a sale under the sales act; in other words, there a vendor-vendee relationship between defendant and plaintiff. The court says:

> "The essence of the contractual relationship between hospital and patient is readily apparent; the patient bargains for, and the hospital agrees to make available, the human skill and physical material of medical science to the end that the patient's health is restored.
>
> "Such a contract is clearly one for services, and, just as clearly, it is not divisible. * * * It has long been recognized that, where service predominates, and transfer of personal property is but an incidental feature of the transaction, the transaction is not deemed a sale within the Sales Act." 123 N.E.2d at p. 794.

There are a whole series of blood transfusion cases which follow the same reasoning. *Dibble, Admr.* v. *Latter Day Saints Hospital*, 12 Utah 2d 241, 364 P.2d 1085; *Goelz* v. *Wadley Research Institute & Blood Bank* (Texas), 350 S.W.2d 573; *Gile* v. *Kennewick Public Hospital District*, 48 Wn. 2d 774, 296 P.2d 662.

The characterization of the contract as one primarily for services as a basis for denying an implied warranty of fitness has been extended to other cases in the service field. In *Foley Corp.* v. *Dove* (Dist. of Col.), 101 A.2d 841, the owner of a drive-in theater sued a company which constructed walls for the breach of its warranty of workmanlike service when the walls collapsed. The court states at p. 842:

> "Appellant attempts to distinguish the present case from the Poole case by contending that the implied warranty involved here is one arising under the Uniform Sales Act: When the buyer makes known to the seller the purpose for which the goods are required and relies on the seller's judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose. The answer to this contention is simply that construction contracts where the furnishing of materials is only incidental to the work and labor performed, do not come within the purview of the Sales Act."

To the same effect is *Ladd* v. *Reed*, 320 Mich. 167, 30 N.W.2d 822. It is clear that the agreement between petitioner and respondent was primarily one to provide services (Resp. Exh. 21, R. 31-40). The supplying of gear was merely incidental to the performance of the services described in the contract. The facts are farther removed from the sales concept than the facts of the

transactions for the furnishing of blood or construction contracts. Here, there was no permanent supplying of material to the customer where the customer becomes the owner of the blood or the construction. There was no transfer of title. Further, the shipowner would know that the gear being used temporarily aboard its ship was not brand-new and was going to be used on his ship today and on another ship tomorrow. He would also know that the stevedore does not manufacture the rope, nor have anything to do with constructing it. In the case of the blood transfusion or the construction contract, the supplier has actually prepared the material for its customer and the customer should be entitled to a greater reliance on the supplier than the customer of a stevedore who merely brings some equipment to a job. If no warranty of fitness is owed to the blood donee and the building owner, then none is owed to the shipowner.

It is noted that even the commentators whose articles are cited by the United States in its brief, must admit that case law supporting the implication of warranties in the service field is lacking. Mr. Farnsworth notes in connection with contracts in the food service field and referring to matters subsequent to 1936:

> "Three cases have since found an implied warranty without basing it on a finding of sale. They are, however, the exception, and most courts proceed on the assumption that to find a warranty one must first find a sale. For example, in *Temple* v. *Keeler* the New York court termed the serving of food a 'qualified sale', a sale of that which is eaten. Even the Massachusetts court which decided *Friend*

v. *Childs Dining Hall Co.*, has, in later cases, shifted the basis of the warranty to the finding of a sale." 57 Col. L. R. at p. 662.

So, even if the warranty of workmanlike service is to be equated with the warranty of a shorebased service contractor or bailor, the weight of authority still imposes a test of reasonable care. Let us take a look at this question from the public policy or equity standpoint about which petitioner is so concerned and see why the majority of the courts have not done what the commentators desire and why this Court should not do so in this case.

The Policy Question

The notion that imposing absolute liability on a supplier is somehow sound as a matter of policy is specious. The three most discussed reasons for doing so in the manufacturer cases are: to facilitate the plaintiff's recovery of compensation; to provide an incentive to the manufacturer to make his product safe; and to spread the risk to those better able to bear it. In his discussion on implied warranties, Dean Prosser takes these arguments to task.[13] In a negligence action against a manufacturer, the plaintiff must prove that his injury was caused by a defect in a product and that the defect existed when the product left the hands of the manufacturer. Strict liability doesn't aid him in this proof. It is true that the plaintiff has to prove negligence and that he seldom has any direct evidence of what went on in

[13] 69 Yale Law Journal, p. 1114.

defendant's plant. He is, however, aided by the *res ipsa loquitur* doctrine or its equivalent which gives him an inference of negligence, and according to Prosser a jury verdict for the plaintiff usually follows. In this particular case the trial judge gave the plaintiff the benefit of an inference of negligence (Find. of Fact [22] R. 26) but found that the respondent had overcome it. This is the apparently rare case where the supplier wins and the petitioner, unable to accept it, demands a change in the law. We have already pointed out that the petitioner here is in a much better position than the usual customer in that he knows where his supplier can be found and can conduct whatever investigation is necessary to prove negligence.

The second ground is to provide incentive to the manufacturer to make a better product. As Prosser points out, it is certainly highly speculative, to say the least, that a manufacturer who is not moved by the prospect of negligence liability, coupled with *res ipsa loquitur*, will be stimulated by an absolute warranty doctrine. Furthermore, the stevedore does not produce the product but merely purchases it and uses it. Certainly, the imposition of such a warranty, as a practical matter, cannot move stevedores to do more than make reasonable inspections of their gear when they have nothing to do with the manufacture of it. It is no answer to say that the stevedore can pass the liability on to the source of the product. This is not practical in the bailor situation such as the stevedore is in. The stevedore will probably have great difficulty in proving that the defect was in existence when he purchased the

product or in identifying the manufacturer because he will have used the gear for some time.

The argument which is entitled to most consideration because it is honest is the risk spreading argument. Manufacturers should absorb the loss because they are better able to pay. Let us look at this argument in the shipowner-stevedore context. In the first place, the longshoreman has long since recovered his damages so that the purpose of such a risk spreading arrangement has been satisfied. Secondly, the shipowner is at least the economic equal of the stevedore and in this case the shipowner probably dwarfs the stevedore so there is no reason to suspect that the stevedore is better able to pay. What really bothers the shipowner is his absolute warranty of seaworthiness. The shipowner says, "if I am stuck, you should be too!" The Court of Appeals puts the matter succinctly in its opinion:

> "The efforts of the shipowner in this case to hold the stevedoring company for action done without fault is an attempt to impose upon the stevedoring company the same degree of liability for unseaworthiness as that which is imposed upon the shipowner. We see no reason in policy or otherwise why the stevedoring company should be liable for unseaworthiness insofar as that doctrine encompasses liability without fault." (R. 51)

The liability of the shipowner for unseaworthiness is based on the policy consideration of assessing the shipowner who is better able to pay than the longshoreman. No such policy consideration exists between the shipowner and the stevedore. This Court has stated that the duties of the shipowner and stevedore to the long-

shoremen are based on different principles than their liability with respect to each other.[14] It is a little late to argue the matter on considerations of fairness and equity. We suppose that it was not fair in the sense of fault that the shipowner was held liable in this case, when it was without fault. Is it then "fair" to pass the liability on to another party who is without fault? We submit that it is not.

CONCLUSION

The judgment of the Court of Appeals should be affirmed or if not, the matter should be sent back to the Court of Appeals for determination of the effect of the express provision of the contract between petitioner and respondent.

Respectfully submitted,

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[14] *Weyerhaeuser SS Co. v. Nacirema Operating Co.*, 355 U. S. 563, 568.